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RESERVATIONS IN THE DECLARATIONS OF ACCEPTANCE OF THE OPTIONAL CLAUSE AND THE PERIOD OF VALIDITY OF THOSE DECLARATIONS: THE EFFECT OF THE SHULTZ LETTER*

By SHIGERU ODA¹

I. INTRODUCTION

THE author, as a Member of the International Court of Justice, stated in the first part of his separate opinion attached to the 1984 judgment in the case of *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)*² that Nicaragua lacked legal standing as an applicant as it had not accepted the compulsory jurisdiction of the Court under Article 36(2) or (5) of the Statute, and that the proceedings initiated by a unilateral application by Nicaragua could not be entertained on the basis of those provisions.³ The Court, however, decided otherwise in its judgment. That question will not be discussed in this article. The author will only examine whether it was legitimate for the United States in 1984 to exclude certain types of disputes from its previous acceptance of the Court's jurisdiction by adding to its declaration, at the eleventh hour prior to Nicaragua's filing of its case against the US, new reservations with immediate effect.

The US declared on 26 August 1946 that it would recognize the compulsory jurisdiction of the Court in

. . . all legal disputes hereafter arising concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.⁴

These expressions are exactly the same as those stipulated under Article 36(2) of the Statute. Yet it was also stated in the declaration that

* © H.E. Judge Shigeru Oda, 1989.

¹ Member of the International Court of Justice. This article was completed in 1987, but because of pressure on space could not be included in the previous volume of this *Year Book*.

² *ICJ Reports*, 1984, p. 392.

³ *Ibid.*, p. 471.

⁴ *ICJ Yearbook*, 1946-7, p. 217.

. . . this declaration shall not apply to:

(a) disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

(c) disputes arising under a multilateral treaty, unless (1) all Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction . . .

This 1946 declaration was to 'remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration'.⁵

On 6 April 1984, only three days prior to Nicaragua's unilateral action before the Court, the US added in the so-called Shultz letter a further reservation to those already made in its 1946 declaration. The Shultz letter purported to exclude from the jurisdiction of the Court

[D]isputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.⁶

Shultz's letter continued by stating:

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years . . .

The 'Notwithstanding' constituted, of course, an allusion to a period of six months required as advance notice for the termination of the declaration. Thus it should be asked whether the addition of this new reservation on 6 April 1984 could effectively exempt the US from its adherence, given in 1946, to the Court's jurisdiction for a dispute unilaterally brought to the Court by Nicaragua on 9 April 1984. The US has implied that the Shultz letter did not purport to terminate the 1946 declaration but only amended it by making a new reservation.

In order to see whether or not this reservation was effective, it will be pertinent to look at the history of reservations to the Optional Clause since the time of the Permanent Court of International Justice (Part II). Secondly the Shultz letter, though not terminating the 1946 declaration, was intended to release, if only partially, the US from the obligation it had borne since 1946. It will be pertinent in this respect to examine the problem of the duration of the validity of a declaration of acceptance of the Optional Clause (Part III). The effect of the Shultz letter in the light of the present circumstances regarding acceptance of the Optional Clause will then be considered (Part IV).

⁵ Ibid.

⁶ Ibid. 1984-5, p. 100.

Relevant indications concerning these declarations can be found in the *Annual Report* in the case of the Permanent Court of International Justice and in the *Yearbook* in the case of the International Court of Justice, but the format of these publications has changed from time to time and the presentation has been inconsistent. At the time of the Permanent Court of International Justice in particular, it appears that the Registry did not necessarily have a precise understanding of how to deal with the Optional Clause. The inconsistency in dealing with the date of signature, deposit or ratification of the Optional Clause in the *Annual Reports* of that Court caused confusion to readers.⁷ The method of description of the declaration in the *Yearbooks* of the present Court changed with the 1956/57 edition and again with that of the 1964/65;⁸ this change of presentation of the

⁷ Ratification was not imposed by the terms of the Optional Clause but in fact some declarations were made subject to ratification while others (which did not require it) were nevertheless ratified. In No. 1 of the Annual Reports of the Permanent Court of International Justice, the table concerning the Optional Clause in Chapter III (p. 138) had three columns headed 'Signatory States—Date of ratification (if any)—Conditions of acceptance', while another table in Chapter X (p. 359) was headed simply 'Signatory States—Date of ratification when required'. In No. 2 of the Annual Reports, the table appeared in Chapter III only, under the headings 'States—Date of signature—Conditions—Date of deposit of ratification (if any)'. In No. 3, the headings of the tables in Chapters III and X were identical in that they indicated 'States—Date of signature—Conditions—Date of deposit of ratification (if any)' (pp. 83 and 335). After No. 4 of the Annual Reports the list in Chapter III disappeared and the format of the table in Chapter X of No. 3 was retained. However, in Report No. 16 a table in Chapter X is headed 'States—Date of signature—Conditions—Date of deposit of ratification', thus omitting '(if any)' from the heading concerning ratification. Presumably what must have been significant was the date of the deposit of the declaration, no matter whether ratification was required under the internal procedures of some countries. When the table indicated the 'Date of deposit of ratification' it might have meant the date of deposit of the declaration itself, whether it was properly ratified under internal procedures (when required), or was simply deposited, in cases where internal ratification was not required.

⁸ In the International Court of Justice *Yearbooks*, the presentation of the facts concerning acceptance under the Optional Clause, after remaining fairly similar from Volume I (1946–7) to Volume 18 (1963–4), was greatly changed when a complete overhaul of the structure of the *Yearbook* was undertaken with Volume 19 (1964–5). Since then it has not changed to the present day.

The information which concerns us here has at various times been dealt with in different chapters of the *Yearbook*. In Chapter III, concerning the Court's jurisdiction, there was from 1946–7 to 1949–50 a table concerning 'Deposit of declaration accepting compulsory jurisdiction'. The table of States accepting compulsory jurisdiction was set out under the headings 'State—Date—Conditions' in the *Yearbook* for 1946–7, but this was changed to 'State—Date—Duration' in the 1948–9 volume, then to 'State—Date of signature—Duration' in the 1949–50 volume. As from the volume of 1950–1 this table disappeared, and under the title of 'Acceptance of compulsory jurisdiction' there was a list headed:

'The following States have deposited with the Secretary-General of the United Nations the declaration recognizing the Court's jurisdiction as compulsory, or had already accepted the jurisdiction of the Permanent Court of International Justice as compulsory for a period that has not yet expired' (*ICJ Yearbook*, 1950–1, p. 43).

This basic type of format continued until the *Yearbook* for 1958–9, but since the 1959–60 volume such reference to the names of States has completely disappeared from Chapter III.

In the *Yearbook* for 1946–7 until that of 1963–4 there was always a chapter entitled 'Texts governing the jurisdiction of the Court' (Chapter X); this was modelled on the practice of the Registry of the Permanent Court of International Justice, which however had also issued such chapters as offprints constituting addenda to Series D, No. 6, bearing the same title. From the time of the *Yearbook* of 1947–8, under the section headed 'Acceptance of the compulsory jurisdiction of the Court', only the texts of new declarations were reproduced. Declarations which had been printed in the 1946–7 volume were not reproduced but simply made the subject of a reference back to that volume. This practice was continued until the *Yearbook* for 1955–6. Since the *Yearbook* for 1956–7 all the declarations in force have always been reproduced. Also in Chapter X, until the *Yearbook* for 1955–6, there was always a 'List of States

declaration of Nicaragua was surely one cause of the differences between Nicaragua and the US concerning the Court's jurisdiction. It is extremely difficult to derive a clear indication of the status of some of the declarations of acceptance of the Optional Clause from the *Annual Reports* of the Permanent Court of International Justice and the *Yearbooks* of the International Court of Justice.

With this caveat, the author deems it useful to proceed with some analysis of these declarations. Tables I and II⁹ show all the declarations made under the Permanent Court of International Justice and the International Court of Justice arranged in chronological order of the first declaration of each State concerned. In the case of renewed declarations by the same State in the respective period, the figures I, II, III etc. are added. Where appropriate, these figures will also be inserted in the text when reference is made to the declarations. In preparing these tables, the author has attempted to be as precise as possible, but it must be understood that these tables are used as an aid to the author's presentation of his argument.

II. RESERVATIONS IN THE DECLARATIONS OF ACCEPTANCE OF THE OPTIONAL CLAUSE

(a) *The Permanent Court of International Justice*

In drafting the Statute of the Permanent Court of International Justice, the Advisory Committee of Jurists in 1920 did not anticipate any reservations being made concerning the compulsory jurisdiction. The Netherlands was the first State accepting the compulsory jurisdiction of the Court (I-1921) to make a reservation. It was rather a modest one, which attempted to limit the jurisdiction of the Court to 'any future dispute in regard to which the parties have not agreed to have recourse to some other

which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice (Art. 36 of the Statute of the International Court of Justice)' (*ICJ Yearbook*, 1947-8, p. 133; the title in the 1946-7 volume was slightly different). The headings of each column of the table listing these States have been changed from 'States—Date of signature—Conditions—Date of deposit of ratification' in the *Yearbook* for 1946-7 to 'State—Date of signature—Conditions—Date of deposit of ratification' in 1947-8; 'State—Date of signature—Conditions—Date of ratification' in 1948-9; 'State—Date of signature—Date of deposit of signature—Conditions' in 1949-50; and 'State—Date of signature—Date of deposit of declaration—Conditions' in the 1951-2 volume. This last type remained until the 1955-6 volume. Since the *Yearbook* for 1956-7, the texts of all the declarations in force have been listed under the title 'Acceptance of the compulsory jurisdiction of the Court in pursuance of Article 36 of the Statute', but the table has been discontinued.

There has been a complete change in the format of the *Yearbook* since volume 19 (1964-5). The former Chapter X was replaced by a new Chapter IV, 'Texts governing the jurisdiction of the Court', in which Section II, 'Declarations recognizing as compulsory the jurisdiction of the Court', contains the complete texts of the declarations.

⁹ Below, pp. 23, 25.

means of friendly settlement'.¹⁰ This type of reservation was used in the 1920s by Estonia (I-1923), Belgium (1925; effective 1926), Ethiopia (I-1926), Germany (I-1927; effective 1928), Spain (1928), Latvia (II-1929; effective 1930), France (II-1929; effective 1931), Italy (1929; effective 1931) and Czechoslovakia (1929; never effective).

In order to reply to the question of the legality of making a reservation to the Optional Clause and to facilitate the acceptance of the compulsory jurisdiction of the Court by as many countries as possible, the General Assembly of the League of Nations, on 2 October 1924, passed a resolution concerning 'Arbitration, Security, and Reduction of Armaments' in which it

Consider[ed] that the study of the . . . terms [of Article 36, paragraph 2] shows them to be sufficiently wide to permit States to adhere to the Special Protocol opened for signature in virtue of Article 36, paragraph 2, *with the reservations which they regard as indispensable*,¹¹

and recommended 'States to accede at the earliest possible date' to the Optional Clause. The Protocol for the Pacific Settlement of International Disputes, which was attached as an annex to that resolution, reads:

The Signatory States undertake to recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but *without prejudice to the right of any State*, when acceding to the special protocol provided for in the said Article and opened for signature on December 16th, 1920, *to make reservations compatible with the said clause*.¹²

Four years after, in 1928, the General Assembly of the League of Nations again passed a resolution along the lines suggested four years previously.

*Pacific Settlement of International Disputes,
Non-Aggression and Mutual Assistance*

(v) RESOLUTION REGARDING THE OPTIONAL CLAUSE OF
ARTICLE 36 OF THE STATUTE OF THE PERMANENT COURT OF
INTERNATIONAL JUSTICE

The Assembly:

Referring to the [1924 resolution] . . . considering that the terms of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice are sufficiently wide to permit States to adhere to the special Protocol opened for signature in virtue of that article, with the reservations which they regard as indispensable, and convinced that it is in the interest of the progress of international justice that the greatest possible number of States should, to the widest possible extent, accept as compulsory the jurisdiction of the Court, recommends States to accede to the said Protocol at the earliest possible date;

¹⁰ *PCIJ*, Series D, No. 4 (2nd edn., 1924), p. 20.

¹¹ *League of Nations Official Journal*, Special Supplement No. 21, p. 21 (emphasis added).

¹² *Ibid.*, p. 22 (emphasis added).

Noting that this recommendation has not so far produced all the effect that is to be desired;

Being of opinion that, in order to facilitate effectively the acceptance of the clause in question, *it is expedient to diminish the obstacles which prevent States from committing themselves*;

Being convinced that the efforts now being made through progressive codification to diminish the uncertainties and supply the deficiencies of international law will greatly facilitate the acceptance of the optional clause of Article 36 of the Statute of the Court, and that *meanwhile attention should once more be drawn to the possibility offered by the terms of that clause to States which do not see their way to accede to it without qualification, to do so subject to appropriate reservations limiting the extent of their commitments, both as regards duration and as regards scope*;

Noting, in this latter connection, that *the reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specifically to certain classes or lists of disputes, and that these different kinds of reservation can be legitimately combined*;

Recommends that States which have not yet acceded to the optional clause of Article 36 of the Statute of the Permanent Court of International Justice should, failing accession pure and simple, consider, with due regard to their interests, whether they can accede on the conditions above indicated; . . . ¹³

Thus, within less than ten years of the foundation of the Permanent Court of International Justice, reservations to acceptance of the jurisdiction of the Court had come to be regarded as permissible in order to make it easier for States to accept the compulsory jurisdiction of the Court.

Great Britain, in its Declaration (I) on 19 September 1929 (effective 1930), together with other Commonwealth nations, such as the Union of South Africa, New Zealand, India, Australia and Canada (which all made similar declarations on the same or next day), attempted to restrict her acceptance of the jurisdiction of the Court and added, in addition to the type of reservation initiated by the Netherlands, two new types concerning disputes among the members of the British Commonwealth and disputes with regard to questions which, by international law, fell exclusively within the declarant's jurisdiction. Great Britain and other Commonwealth nations also reserved, with some provisos,

. . . the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations.

In the 1930s, following the initiative taken by Great Britain, it became common practice for States to make a variety of reservations to the declaration of acceptance of compulsory jurisdiction. Some States followed the reservation of Great Britain in some way or another. The reservation concerning domestic jurisdiction was included by Yugoslavia (1930), Albania (I-1930), Persia (1930; effective 1932), Romania (I-1930; effective 1931), Poland (1931; never effective), Argentina (1935; never effective), Brazil

¹³ Ibid., Special Supplement No. 64, p. 183 (emphasis added).

(II-1937), Iraq (1938; never effective) and Egypt (1939; never effective). On the other hand, the notion of suspension in respect of any dispute before the Council of the League of Nations was adopted by Italy, Czechoslovakia, France (II), Peru (1929; effective 1932) and Iraq.

In addition, a new type of reservation for disputes relating to territorial status was made by Greece (I-1929), Albania, Persia, Romania (I-1930; effective 1931) and Iraq. Furthermore, Colombia, in a declaration (II) made in 1937 to replace a previous one (I) of 1932, made it clear that the new declaration would apply only to disputes arising out of facts subsequent to 6 January 1932, the date on which it first accepted the Court's compulsory jurisdiction.

On 28 February 1940 Great Britain, making a new declaration (II), added a further reservation concerning 'disputes arising out of events occurring at a time when His Majesty's Government were involved in hostilities'. This type of reservation was immediately followed by other Commonwealth nations, such as India (II), New Zealand (II), the Union of South Africa (II) and Australia (II). (Canada did not make such a reservation.)

(b) *The International Court of Justice*

During the preparation of the Statute of the International Court of Justice at the San Francisco Conference, no doubt was expressed as to the permissibility of making reservations to acceptance of the compulsory jurisdiction of the Court to be newly founded. The report of Subcommittee D to Committee 1 of Commission IV on Article 36 of the Statute of the International Court of Justice, prepared on 31 May 1945, clearly recognized this permissibility. It read:

The question of reservations calls for an explanation. As is well known, the article has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3 in order to make express reference to the right of the states to make such reservations.¹⁴

Most declarations referring to the compulsory jurisdiction of the new Court have been accompanied by reservations; a number of States added various reservations at the time they renewed their previous declarations upon expiration of the period stipulated. The scope of reservations has been considerably more far-reaching than in the case of those declarations which were made under the Permanent Court of International Justice.

For example, the famous Vandenberg amendment in the US declaration

¹⁴ *United Nations Conference on International Organization, Documents*, vol. 13, p. 559.

of 26 August 1946 (reservation (c) of the declaration) formed one such reservation and was emulated by Pakistan (III-1960), Malta (I-1966) and India (III-1974). The so-called automatic reservation, also in the US declaration (reservation (b)), was adopted subsequently by France (I-1947; effective 1949), Mexico (1947), Liberia (1952), Sudan (1957; effective 1958) and Malawi (1966).

There were also some instances in which the declarant States attempted to make reservations in respect of disputes which were about to occur. Australia's declaration of 6 February 1954 (I) attempted to exclude from the Court's jurisdiction:

. . . disputes arising out of or concerning jurisdiction or rights claimed or exercised by Australia

(a) in respect of the continental shelf of Australia and the Territories under the authority of Australia, as that continental shelf is described or delimited in the Australian Proclamations of 10 September 1953 or in or under the Australian Pearl Fisheries Acts . . . ¹⁵

This Australian Declaration was made only a few months after an agreement was reached with Japan to submit jointly to the International Court of Justice a dispute on Japanese pearl fishing on Australia's continental shelf subject to successful negotiations on a *modus vivendi*.

India issued a new declaration in 1974 (III) excluding matters concerning the law of the sea, including 'the determination and delimitation of its maritime boundaries', while it was reported that some negotiations with Bangladesh were taking place concerning the maritime boundaries of the Gulf of Bengal. While the law of the sea negotiations were proceeding in the United Nations, the new reservation added to exclude matters concerning the law of the sea also appeared in several declarations, such as those of Canada (I-1970), the Philippines (II-1971; effective 1972), New Zealand (1977) and Malta (II-1981 and III-1983). These are only a few examples of the types of reservation made.

Egypt recognized in 1957 the compulsory jurisdiction of the Court in all legal disputes that might arise under the 1957 Declaration on the Suez Canal and the arrangements for its operation concerning the interpretation and application of the 1888 Constantinople Treaty. This declaration may also be regarded as a reverse of the acceptance of compulsory jurisdiction.

(c) Conclusion

In the light of the practice concerning reservations to the Optional Clause throughout the period of the Permanent Court of International Justice and the International Court of Justice, the reservations made by the

¹⁵ *ICJ Yearbook*, 1953-4, p. 210.

US in 1984 cannot be held so exceptional or extraordinary as to fall outside the purview of permissibility.

III. THE PERIOD OF VALIDITY OF THE DECLARATIONS CONCERNING THE ACCEPTANCE OF THE OPTIONAL CLAUSE

(a) *The Permanent Court of International Justice*

1. *Types of Declaration*

Table III¹⁶ shows various types of declaration made for acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, classified from the viewpoint of ostensible duration. The following observations may be made from analysis of this Table.

First, in the early period of the Permanent Court of International Justice—in other words in the 1920s—, most of the States signatory to the Statute of the Permanent Court accepted the Optional Clause. Many of them did so for a fixed period, mostly five years,¹⁷ and then renewed the period after the expiration of the initial one. Those declarations naturally ceased to be valid at the expiration of the periods specified. Some declarations were still valid when the International Court of Justice came into being and remained valid under Article 36 (5) of its Statute, but the periods mentioned had all expired by 1950.

A remarkable development in this respect was seen in 1930 with the action of Luxembourg in making a declaration for a fixed period which would automatically be renewed unless a six-month advance notice was given.¹⁸ The Declaration of Luxembourg (II-1930) read as follows:

The present declaration is made for a period of five years. Unless it is denounced six months before the expiration of that period, it shall be considered as renewed for a further period of five years and similarly thereafter.¹⁹

No other State followed this example during the period of the League of Nations. This declaration still remains valid under the terms of Article 36 (5) of the Statute of the present Court.

Secondly, particularly at the very beginning of the existence of the Permanent Court of International Justice, some declarations, mostly of Latin-American countries, did not specify any period at all for the duration of the declaration.²⁰ Of those, the declarations of Costa Rica, Liberia, Guatemala

¹⁶ Below, p. 27.

¹⁷ Table III, para. 1.

¹⁸ Table III, para. 2.

¹⁹ This English translation was made by the International Court of Justice (see *ICJ Yearbook*, 1982-3, p. 73). It is different from the translation that appeared in the Seventh Annual Report of the Permanent Court of International Justice (*PCIJ*, Series E, No. 7, p. 464).

²⁰ Table III, para. 3.

and Nicaragua (none of which became parties to the Statute of the Permanent Court, since they did not ratify the Protocol of Signature of the Statute) were in any case invalid.²¹ Except for the examples of Colombia (II) and Paraguay, which will be explained later, and also the cases of Bulgaria and Portugal, which were not parties to the Statute of the present Court at its beginning in 1945, all the other declarations which did not specify any period for their duration remained valid after 1945 under Article 36 (5) of the Statute of the present Court, that is, those of El Salvador (1921; effective 1930), Uruguay (1921), Haiti (1921), Panama (1921; effective 1929), Dominican Republic (1924; effective 1933) and Colombia (II–1937).

Thirdly, the most remarkable development was in 1929, when Great Britain introduced a new concept of the immediate terminability of a declaration.²² Great Britain on 19 September 1929 (effective on 5 February 1930) accepted compulsory jurisdiction in a declaration which was stated to remain valid for the first ten-year period and thereafter until notice of termination was given. The declaration read in part as follows:

I accept as compulsory . . . the jurisdiction of the Court . . . for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance.²³

This example was followed on the same or the next day by the then Commonwealth countries, namely the Union of South Africa (I), India (I), New Zealand (I), Australia (I) and Canada. These nations of the British Commonwealth, which as later explained²⁴ extensively modified the content of their acceptance of the compulsory jurisdiction in 1939, terminated their respective declarations in 1940 and replaced them by new declarations of similar type, but with the addition of new reservations, that is, Great Britain (II), India (II), New Zealand (II), Union of South Africa (II) and Australia (II) (in the case of Canada, its 1929 Declaration was simply left untermiated). Four of the new declarations fixed five years (instead of the ten years in the previous declarations) for the initial period, after expiry of which they would be valid until notice to terminate was given, but the Union of South Africa (II) did not make provision for an initial period. All five of these new declarations by member States of the British Commonwealth, as well as the 1929 Declaration of Canada, were valid in 1945 under the new Court.

In addition, the 1929 example of the British Commonwealth countries was followed by Persia (1930; effective 1932) by fixing an initial period of six years, and Latvia (III–1935) and Iraq (1938), specifying an initial

²¹ With regard to the status of Nicaragua *vis-à-vis* the Permanent Court of International Justice, the author's view may be different from the opinion stated in the 1984 judgment of the Court (*ICJ Reports*, 1984, pp. 399–402). Cf. the author's view stated in his separate opinion, *ibid.*, pp. 473–5.

²² Table III, para. 4.

²³ *PCIJ*, Series E, No. 6, p. 479.

²⁴ Below, p. 12.

period of five years.²⁵ Of these countries, Iraq, not having ratified the Protocol of the Signature of the Statute of the Permanent Court, had not become a party to it, and Latvia ceased to exist as a State at the start of the United Nations. Only the declaration of Persia (Iran) was regarded as valid under the International Court of Justice at its start.

2. *Termination of Declarations*

A number of declarations expired at the end of their respective fixed periods and some were renewed while others were not.²⁶ This, however, did not give rise to any equivocal situation. Furthermore, the hypothesis of the immediate terminability of the acceptance of the jurisdiction encountered no challenge.²⁷

Two problems must, however, be mentioned in relation to the termination of declarations under the old Court.

First, it is to be noted²⁸ that two of the declarations without any reference to duration were terminated or amended while still remaining valid. Colombia, which on 6 January 1932 made a declaration (I) without any reference to duration, made a fresh declaration (II) on 30 October 1937 in order to include a new reservation to the effect that disputes arising out of the facts which took place prior to that date should be excluded. No objection seems to have been lodged, probably because the terminated declaration was replaced by a new one. On the other hand, Paraguay, by a decree of 26 April 1938, simply withdrew the acceptance of compulsory jurisdiction which had been expressed by its decree of 14 January 1933.²⁹ On being notified of Paraguay's withdrawal by the Secretary-General of the League of Nations, some countries made express reservations as to the effectiveness of such denunciation by Paraguay:

[*Bolivia*] makes the most formal reservations as to the legal value of the decree and requests the Secretary-General to communicate these reservations to the States signatories of the Statute and to the Members of the League of Nations.

[*Belgium*] in taking note of this denunciation, feels bound to make all reservations.

[*Brazil*] cannot accept such declaration without express reservation.

[*Sweden*] finds itself obliged to formulate every reservation; in its view it will be for the Court itself, should occasion arise, to pronounce on the legal effects of that declaration.

[*Czechoslovakia*] is of opinion that, in the absence of any provision in the Statute regarding the denunciation of declarations, the matter is one in which reference should be made to the general rules of international law concerning the termination of international undertakings.

[*The Netherlands*] while not opposed to the denunciation, finds itself obliged to

²⁵ Table III, para. 4 (2), (3).

²⁶ See Table III, para. 1.

²⁷ See Table III, para. 2.

²⁸ See Table III, para. 3.

²⁹ *PCIJ*, Series E, No. 14, p. 57.

formulate every reservation as regards the right of States to denounce treaties which do not contain a clause to that effect.³⁰

Secondly, it should not be overlooked³¹ that some declarant States, namely Great Britain and France, by adding some new reservations before expiry of the understood period of validity partially terminated their obligations. On 7 September 1939 Great Britain, which had made a declaration valid from 5 February 1930 for an initial ten year period and then until notice of termination, stated in its letter:

[T]he position to-day shows clearly that the Covenant has, in the present instance, completely broken down in practice, that the whole machinery for the preservation of peace has collapsed, and that the conditions in which His Majesty's Government accepted the Optional Clause no longer exist . . .

I am, therefore, directed to notify you that His Majesty's Government, believing themselves to be firmly defending the principles on which the Covenant was made, will not regard their acceptance of the Optional Clause as covering disputes arising out of events occurring during the present hostilities.³²

The other Commonwealth nations, New Zealand, Australia, Canada, the Union of South Africa and India, followed this example on the same day or a few days later. Similarly France, which on 7 April 1936 had made a declaration (III) for a five-year period (as from 25 April 1936), sent the Secretary-General of the League of Nations on 10 September 1939 a letter which read in part:

Les conditions dans lesquelles le Gouvernement français avait adhéré à cette clause se trouvent aujourd'hui profondément modifiées. En particulier, depuis que le système de règlement des conflits internationaux établi par le Pacte de la Société des Nations n'est plus regardé comme liant uniformément et obligatoirement tous les Membres de la Société des Nations, la question de la belligérance et des droits des neutres apparaît sous un aspect entièrement nouveau.

Le Gouvernement français considère donc, comme le Gouvernement britannique, dont le point de vue vous a été exposé d'autre part, que son acceptation de la clause de l'article 36 du Statut de la Cour permanente de Justice internationale ne peut plus désormais avoir d'effet à l'égard des différends relatifs à des événements qui viendraient à se produire durant le cours de la présente guerre.³³

These statements were made only a few days after the outbreak of the Second World War marked by the German invasion of Poland.

These letters were received in the Secretariat of the League of Nations and transmitted to States parties to the Protocol of Signature of the Statute and others. The publication of the Permanent Court of International Justice shows that some reservations were expressed.³⁴ In its reply of 25 September 1939, the Swiss Government entered 'reservations . . . regarding

³⁰ Ibid., No. 15, p. 227.

³¹ See Table III, para. 4.

³² *PCIJ*, Series E, No. 16, p. 339.

³³ Ibid., p. 337.

³⁴ Ibid., p. 333.

the principle which a denunciation effected in such circumstances involves'. In their letters, Belgium (20 November 1939), the Netherlands (30 November 1939), Peru (12 December 1939), Estonia (5 January 1940) and Siam (6 May 1940) reserved their points of view. The Danish Government, on 29 May 1940, also expressed reservations concerning the declarations of Commonwealth nations and France, 'more particularly as regards their effect in relation to disputes not immediately connected with the war'. The Norwegian and Swedish Governments, on 15 and 20 December 1939 respectively, entered 'reservations as to the legal effect of the above acts of denunciation, more particularly as regards disputes not connected with the war'. They also drew attention to the

fact that, in virtue of Article 36 of the Statute and the declarations relating thereto, it rests with the Court itself to decide questions as to its own jurisdiction and, should the case arise, to pronounce upon the validity and, if necessary, the scope of the acts of denunciation referred to.

The Brazilian Government on 7 May 1940 also expressed reservations as regards this 'unilateral action . . . in so far as concerns all matters relating to its rights as a neutral in the present war and coming within the jurisdiction of the Court'. It is interesting to note in this connection that Sweden suggested that, should the case arise, the Court should pronounce on the legal effect or the scope of the denunciation of the existing declarations relating to the withdrawal of the declaration of Paraguay, and that Sweden and Norway jointly made a similar suggestion concerning the amendments of the Commonwealth nations and France.

(b) *The International Court of Justice*

1. *Types of Declaration*

Table IV³⁵ has been prepared in order to indicate various types of declarations for acceptance of compulsory jurisdiction under the Statute of the International Court of Justice, classified from the viewpoint of ostensible duration. On the basis of these declarations, the following observations may be made.

First, the declarations made for a fixed period have been extremely few compared with those in the period of the Permanent Court; furthermore, these few declarations were made only at the very beginning of the Court's existence.³⁶ With the exception of Turkey I, which, after the expiry of the period, was renewed four times, and of El Salvador I, many other declarations of this category either simply expired after the lapse of the period, like those of Guatemala, Brazil, Bolivia and Turkey V, or were replaced, like those of Norway I, Denmark I, France I, Sweden I, Honduras I,

³⁵ Below, p. 28.

³⁶ Table IV, para. 1.

Belgium I and Israel I, by differently formulated declarations. Honduras II (1954) and Costa Rica (1973) stated that a fixed period would automatically be renewed, but Honduras II was replaced just after the first six-year period by Honduras III, which was formulated differently. Of these declarations which expressly mentioned a fixed period of validity, only those of El Salvador II, which is valid for a ten-year period from 1978, and of Costa Rica, whose latest five-year period of validity started in 1983, are valid as of 1 April 1987.

Secondly, the declaration which is automatically renewed unless the six-month advance notice is given, a type commenced by Luxembourg in 1930, is found in Netherlands II (1956), Norway II (1956), Denmark II (1956), Sweden II (1957), Finland (1958) and Norway III (1976),³⁷ and except for Norway II, which was replaced by Norway III, they are all still valid today for a renewed fixed period of time unless the renewal is denounced with six-months' notice.

Thirdly, there are some declarations without any fixed period, or those which were made for an indefinite or unlimited period.³⁸ Egypt (1957), Uganda (1963), Nigeria (1965), Malawi (1966), Swaziland (1969), Botswana (1970), Togo (1979), Senegal II (1985), Honduras IV (1986) remain valid.

Fourthly, declarations with an initial fixed period and remaining valid until notice of termination is given³⁹—declarations of the type initiated by Great Britain's declaration in 1929—were seen only in the early days of the UN, and there has been no further example since that of Austria (1971). At any rate the initial fixed period of all of these declarations has already expired, and thus it must be recognized that, nowadays, the declarations of this category, such as Liberia (1952), Portugal (1955), Cambodia (1957), Belgium II (1958), Japan (1958) and Austria (1971), may be terminated by simple notice of termination. Declarations of the type which remains valid simply until notice of termination (the Union of South Africa was the only example in the Permanent Court) have increased in number, for instance Sudan (1958), Pakistan III (1960), Somalia (1963), Kenya (1965), Gambia (1966), Mauritius (1968), UK VI (1969), Philippines II (1971), India III (1974), Australia II (1975), Barbados (1980), Malta III (1983) and Canada II (1985).⁴⁰

A *fifth* category is formed by certain declarations which, without fixing the period of validity, require six-month or one-year advance notice to terminate the acceptance of jurisdiction.⁴¹ This type was never seen in the period of the Permanent Court, but in the early days of the present Court the United States (1946), China (1946), Mexico (1947), Switzerland

³⁷ Table IV, para. 2.

³⁸ Table IV, para. 3.

³⁹ See Table IV, para. 4 (1).

⁴⁰ Table IV, para. 4 (2).

⁴¹ Table IV, para. 5.

(1948), Liechtenstein (1950) and, later, New Zealand (1977) each made a declaration within this category, which, except for those of the United States and China, remain valid.

2. *Termination of Declarations*

All the declarations made for a fixed period have expired, one after another, except for El Salvador II and Costa Rica, as previously explained.⁴²

There have been many instances of declarations made, which were to remain valid until notice of termination was given, being terminated by notification with immediate effect. Of those declarations which were made under the Permanent Court but remained valid under the present Court, Canada (1930), Great Britain (II-1940), India (II-1940), New Zealand (II-1940), Union of South Africa (II-1940) and Australia (II-1940) were terminated and replaced by the fresh declarations under the new Court in 1970, 1955, 1956, 1977, 1955 and 1954 respectively. Iran's declaration (1930; effective 1932) under the old Court was simply withdrawn on 9 July 1951.⁴³ Of the many declarations of this type made under the present Court,⁴⁴ Netherlands I (1946), Philippines I (1947), Pakistan I (1948), France I (1949), Australia I (1954), United Kingdom I (1955), UK II (1955), South Africa (1955), India I (1956), Pakistan II (1957), UK III (1957), UK IV (1958), India II (1959), France II (1959), UK V (1963), Malta I (1966), Canada I (1970), and Malta II (1981) were withdrawn by notice of termination but replaced by new declarations which all carried new reservations. On the other hand, Union of South Africa (1955) and France III (1966) were simply withdrawn on 12 April 1967 and 2 January 1974 respectively, and Israel II (1956), which had been amended by the addition of reservations on 28 February 1984, was withdrawn on 21 November 1985.

It may be noted that the declarations made to remain valid until notice have not given rise to any ambiguity. In particular, the United States' six-month advance notice of the termination of its declaration dated 8 October 1985 did not raise any legal issue. The case of China, in which the Government of the People's Republic of China, after establishing its status in the UN, indicated by letter of 5 September 1972 that it 'does not recognize the statement made by the defunct Chinese Government [in 1946, which required a six-month advance notification to terminate]' may be considered as a special exception.

In connection with the termination of declarations under the present Court, however, there are again two problems which merit attention.

First, some declarations made without reference to duration of validity or for an indefinite period have been withdrawn. Though they were immediately replaced by new declarations, the latter carried many types of

⁴² See Table IV, para. 1.

⁴³ See Table III, para. 4.

⁴⁴ See Table IV, para. 2.

reservation from the Court's jurisdiction. Of the declarations made under the Permanent Court which remained valid under the present Court by virtue of Article 36 (5) of its Statute,⁴⁵ El Salvador (1921; effective 1930) was explicitly replaced by the new declaration (I-1973), which excluded various categories of disputes from the Court's compulsory jurisdiction. Of the declarations made under the present Court in this category,⁴⁶ Honduras III (1960) and Senegal I (1985) were terminated but replaced by the new declarations with some additional reservations. Unlike the case of Paraguay's withdrawal in the period of the old Court, as previously explained, the withdrawal of these declarations under the present Court, did not meet with any objection or reservation from any other country.

Secondly, another significant trend concerning declarations accepting the Optional Clause cannot be overlooked in this respect. An attempt to amend the terms of reservations would seem to amount in effect to the same as the termination of the declaration containing the reservations in question, in so far as an existing obligation under the Optional Clause is terminated. Today there are quite a number of declarant States which, though maintaining the position that the declarations remain valid, have reserved the right to exclude from submission to the Court's jurisdiction any given category of dispute. This would be the same in substance as a simple replacement by new declarations, and, if this right is permissible during the fixed period of validity of the original declarations, this cannot be regarded as acceptance of the compulsory jurisdiction for a certain fixed period. This precedent was initiated by Portugal. The declaration of Portugal of 19 December 1955, which was to be valid for the initial period of one year and then until the notice of termination, read, in part, as follows:

The Portuguese Government reserves the right to exclude from the scope of the present declaration, *at any time during its validity*, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification.⁴⁷

When the declaration of Portugal was transmitted to the States parties to the Statute of the International Court of Justice, the Government of Sweden responded on 23 February 1956 by making a reservation on its position concerning Portugal's reservation:

The Swedish Government is compelled to state that in its opinion the cited condition in reality signifies that Portugal has not bound itself to accept the jurisdiction of the Court with regard to any dispute or any category of disputes. The condition nullifies the obligation intended by the wording of Article 36, paragraph 2, of the Statute where it is said that the recognition of the jurisdiction of the Court shall be 'compulsory *ipso facto*'.

For the stated reason, the Swedish Government must consider the cited con-

⁴⁵ See Table III, para. 3.

⁴⁶ See Table IV, para. 3.

⁴⁷ *ICJ Yearbook*, 1955-6, p. 186 (emphasis added).

dition as incompatible with a recognition of the 'Optional Clause' of the Statute of the International Court of Justice.⁴⁸

In fact, however, the precedent of the reservation made by Portugal has been followed by a number of States, as shown in Table V.⁴⁹ Of these declarations, those of Somalia, Kenya, France III, Malta I, II and III, Mauritius, UK VI and Canada I and II were made to remain valid until notice of termination was given,⁵⁰ and thus the declarant States had reserved from the outset the right not only to amend but also to terminate them. Israel, which did not specifically claim the right of amendment in its declaration of 1956, added new reservations in 1984, but it could certainly have terminated its acceptance of the jurisdiction at any time. The declarations of Malawi, Swaziland, Botswana, Togo, Senegal I and II, and Honduras IV,⁵¹ all of which reserve a right of amendment, do not contain in themselves any reference to the period of validity. In some cases, furthermore, the right to amend could have been or may possibly still be exercised during certain periods of validity. El Salvador (I and II) could have amended its declaration in the initial fixed period of five years after 1973 and can amend it during the ten years from 1978 after the first initial period was renewed.⁵² In the declarations of Norway III and New Zealand,⁵³ amendment, though only in the special case arising in the light of the results of the Third UN Conference on the Law of the Sea in respect of the settlement of disputes, would be permissible during the period stipulated as advance notice to terminate.

It is to be noted that, except for the reservation of position made by Sweden *vis-à-vis* Portugal, no objection has ever been lodged against those claims to the right to amend *at any time*.

(c) Conclusion

After having looked at the precedents relating to the termination of declarations throughout the period of the Permanent Court of International Justice and the International Court of Justice, it can be said, *first*, that, despite the challenges to Paraguay's withdrawal of acceptance of compulsory jurisdiction in 1938, the immediate termination of declarations made for an indefinite period or without reference to duration of validity is no longer a problem; *secondly*, that, despite the questioning of Portugal's initiative in claiming in 1955 the right *at any time* to amend the reservations in its declaration, such right is no longer challenged. That being so, it becomes illogical to maintain that those declarations which do not feature

⁴⁸ *ICJ Pleadings, Right of Passage over Indian Territory*, vol. 1, p. 217.

⁴⁹ Below. p. 30.

⁵⁰ See Table IV, para. 4 (2).

⁵¹ See Table IV, para. 3.

⁵² See Table IV, para. 1.

⁵³ See Table IV, para. 2 and para. 5 (2).

any reference to duration, and thus contain no clause concerning the period of their validity, cannot, for that simple reason, be either terminated or amended. After all, some of those very declarations now explicitly reserve the right to add further reservations *at any time*, and such additions constitute amendments or may, indeed, be viewed as terminating the former text while substituting the new. Thus, supposing *arguendo* that Nicaragua were, contrary to the author's view, subject to the compulsory jurisdiction of the International Court of Justice pursuant to Article 36(5) of the Statute, the declaration which Nicaragua made in 1929 without any fixed period of duration would in that event have to be interpreted, in view of the past practice analysed above, as being terminable *at any time*.

Yet the 1984 Judgment of the Court states:

[T]he right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.⁵⁴

Here the Court seems to have given inadequate consideration to a feature of the accumulating practice in regard to Article 36(2), namely the framing of declarations so as to be conditional on a right of amendment or termination by notification *at any time*. Surely an instrument claiming such a right would have to be ruled invalid if it were subject to treaty law, since no party may unilaterally alter or terminate a treaty, still less with immediate effect. Yet there has been no move to condemn declarations of the kind described. Hence, the requirement of good faith notwithstanding, the analogy with treaty law is misleading.

It would take the author too far afield to examine here the wider implications of unilateral declarations from the viewpoint of treaty law. May it suffice to draw attention to just two points. In the first place, the only treaty involved is the Statute of the Court (and, for UN members, the Charter with which it is integral) of which each declaration constitutes an application. Hence it is the correctness, rather than the consequences, of that application which may be judged by treaty law, and the essential test of that correctness is conformity with the terms of the clause applied, i.e., Article 36 (2) itself. Secondly, the nexus of rights and obligations constituted by the application of Article 36 (2) within the group of declarant States is inherently subject to change, and no declarant can suppose otherwise. Indeed, the very significance of the 'option' taken by a declarant is the braving of the partially unknown. It would therefore be inconsistent with the nature of the situation to ban the element of sudden alteration. Moreover, it is this underlying instability which necessitates emphasis on reciprocity, a principle which is justified by, *inter alia*, the need to mitigate the effects of surprise. Had

⁵⁴ ICJ Reports, 1984, p. 420.

treaty law been applicable, even by analogy, in the way upheld by the Court, such emphasis would be redundant. It is to the subject of reciprocity that the author now turns.

IV. RECIPROCITY OF ACCEPTANCE OF THE OPTIONAL CLAUSE

The present situation with respect to the duration of declarations, as at 1 April 1987, is demonstrated in the list below. The declarations of the States underlined are those in which the right is reserved to exclude *at any time* from submission to the Court's jurisdiction any given category of dispute.⁵⁵

A. Declarations whose termination is subject to some restriction of period:

- (i) Declarations which may not be terminated before the fixed period expires:

Costa Rica, El Salvador II (see Table IV, para. 1(3), (4)).

- (ii) Declarations which require a six-month period for termination of their automatic renewal:

Denmark II, Finland, Netherlands II, Norway III, Sweden II (see Table IV, para. 2);

Luxembourg II (under Article 36 (5) of the ICJ Statute) (see Table III, para. 2).

- (iii) Declarations which will remain valid for a certain period after notice of termination is given:

Liechtenstein, Mexico, New Zealand, Switzerland (see Table IV, para. 5).

B. Declarations terminable at any time by notice:

Austria, Belgium II, Democratic Kampuchea (Cambodia), Japan, Liberia, Portugal (see Table IV, para. 4 (1));

Australia II, Barbados, Canada II, Gambia, India III, Kenya, Malta III, Mauritius, Pakistan III, Philippines II, Somalia, Sudan, UK VI (see Table IV, para. 4 (2)).

C. Declarations which do not contain any reference to duration or are made for an indefinite or unlimited period:

Botswana, Egypt, Honduras IV, Malawi, Nigeria, Senegal II, Swaziland, Togo, Uganda (see Table IV, para. 3);

Colombia II, Dominican Republic, Haiti, Panama, Uruguay (under Article 36(5) of the ICJ Statute) (see Table III, para. 3).

It is a striking fact *first of all* that those States which at present in their declarations impose upon themselves the obligation not to escape from the compulsory jurisdiction of the Court in the face of the possibility of being

⁵⁵ See Table V. As stated above, New Zealand and Norway reserved the right to amend their declarations, but only in the special case arising in the light of the results of the Third UN Conference on the Law of the Sea in respect of the settlement of disputes.

brought before the Court are extremely limited in number. Excluding the States underlined which reserve the right to amend *at any time*, there are only eleven countries which really adhered to the compulsory jurisdiction of the Court after the US withdrew in April 1986: two in the western hemisphere, Costa Rica and Mexico, and nine States in the group of Western European and other States, Denmark, Finland, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Norway, Sweden and Switzerland.⁵⁶

Secondly, the question of reciprocity may arise in a case where for one party the adherence to the Optional Clause is terminable *at any time* and the other party is bound by its own declaration not to terminate for a certain fixed period. The Optional Clause in effect plays a double role: one positive, in that it may on occasion enable a unilateral application to succeed, and the other negative, in that it may sometimes result in a respondent being brought to the Court against its actual will. Thus a State, by declaring its acceptance of the compulsory jurisdiction of the Court, may seek to acquire *locus standi* in a case in which the odds are in its favour, but on the other hand it may, where it feels placed at a disadvantage, try to release itself from the compulsory jurisdiction of the Court by the termination or amendment of its declaration. In view of the fact that the Optional Clause was so drafted as to enable each declarant State to 'recognize as compulsory . . . the jurisdiction of the Court . . . [only] in relation to any other State accepting the same obligation',⁵⁷ is it reasonable or equitable to allow a party, which as a respondent is free to escape at any time from the compulsory jurisdiction of the Court, to take undue advantage, as an applicant, by imposing upon the other party the burden of inescapability which it does not itself bear?⁵⁸ The reciprocity of the obligation must exist at the date of the seisin of the case, and acceptance of the Court's jurisdiction by the applicant and the respondent must be current at that date.

The US declaration in 1946 was expressed to remain in force until the expiration of six months after notice of termination was given. Apart from the question whether a State can alter its declaration within the fixed period of validity (which in the case of the US comprised a six-month notice period), the author is of the view that, in the specific context of reciprocity, and as a matter of principle, no country, as applicant, may legitimately rely upon an obligation which it does not itself bear but which the respondent

⁵⁶ As to New Zealand and Norway, see previous note.

⁵⁷ Article 36 (2) of the Statute.

⁵⁸ Interesting in this respect is a new type of reservation initiated in 1959 by India, which had been an adherent to the Optional Clause, to prevent a non-declarant State from suddenly taking advantage as an applicant of the immediate acceptance of the Optional Clause. This declaration of 14 September 1959 excluded a case in which 'the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court' (*ICJ Yearbook*, 1959-60, p. 242). This formula was followed by Somalia (25 March 1963), Malta (29 November 1966), Mauritius (4 September 1968) and the UK (1 January 1969).

has undertaken through its declaration. By that criterion, Nicaragua was barred from invoking the US self-imposed six-month restriction. It follows, in the author's analysis, that even on the hypothesis (supported by the Court) that the Nicaraguan declaration was effective, the US was, in relation to Nicaragua, fully exempted from the Court's jurisdiction on the date of Nicaragua's application. The Shultz letter was thus to that specific extent effective even if its effect was intended also to be general, and whether or not that intention could be legally sustained.

V. EVALUATION OF THE OPTIONAL CLAUSE

The interpretation of the declaration of acceptance of the compulsory jurisdiction of the Court as the author has presented it above may be criticized as an attempt to nullify the original intention of the Optional Clause. Such criticism may be answered as follows: this clause was first proposed at the beginning of the Permanent Court of International Justice shortly after the termination of the First World War, following failure to actualize the idealistic view that, as in a national domestic society, a court should be provided with full jurisdiction over any dispute in the international community. The drafters of the Statute of the Permanent Court might have thought that this Optional Clause would be a first step towards the final goal that the International Court should be given full jurisdiction over disputes. This same idea concerning the Optional Clause was also prevalent when the new Statute of the International Court of Justice was being prepared at the San Francisco Conference in 1945 against the background of regret for the 'untold sorrow to mankind' brought by the 'scourge of war'.⁵⁹ The rule of law should prevail in the international community as in modern domestic society, while the supremacy of the courts is always to be maintained. Yet the reality of the international community—where a lack of confidence in international law still prevails and the law-enforcement machinery is still non-existent—had not reached a stage that could satisfy the dreams of the idealists in either the early 1920s or the mid-1940s.

The author notes that, in contrast to the period of the Permanent Court of International Justice, when a great majority of the States parties to its Statute were subject to the compulsory jurisdiction of the Court under the Optional Clause, the present situation in the 1980s is that adherence to the compulsory jurisdiction of the Court has been declared by far less than one-third of the parties to the Statute of the International Court of Justice. In addition, the Optional Clause, which was drawn up in 1920 without foreseeing any reservations, is now encumbered by the great variety of reservations attached to it. In spite of the appeal made by the United Nations in

⁵⁹ See the Preamble to the UN Charter.

1974 in General Assembly Resolution 3232 (XXIX) concerning the review of the role of the International Court of Justice, which read in part:

[The General Assembly] [r]ecognizes the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute,

only three States (Togo, Barbados and Senegal) have adhered to the Optional Clause in the past decade.

The Court should not close its eyes to the practice and experience over the last 40 years in the international community, which has given a new meaning to the Optional Clause. The basic principle that the jurisdiction of any judicial institution in the international community is based upon the consent of sovereign States has never been changed, and the role of the Optional Clause can never override but must always sustain that principle.

In spite of this, the author believes that the Optional Clause will certainly remain useful in the event that any *bona fide* parties to a dispute, though not willing to initiate proceedings by concluding a special agreement, may not object to coming before the Court if the other party is willing to do so. On the other hand, the author is afraid that the interpretation of the Optional Clause given by the 1984 judgment as quoted above will inevitably induce declarant States to terminate their declarations or at least drop from them any advance notice clause, so as to avoid having to answer any case unilaterally brought by other States, which themselves can take advantage of withdrawing at any time from their obligations under the Court's jurisdiction. Any such *débandade* would vastly diminish the importance of the Optional Clause, which is already an endangered species. In fact, Israel and the US have since 1984 terminated their acceptance of the compulsory jurisdiction of the Court, and no State has joined in the group of declarant States adhering to the compulsory jurisdiction.

A final word may be in order from the viewpoint of appearances, which are unduly influential upon public opinion and even upon the opinions of political decision-makers. It cannot be denied that the consequences of the Optional Clause have included an exaggeration in the public mind of the importance of the Court. The case brought by Nicaragua against the US was the first for a quarter of a century to found the Court's jurisdiction mainly upon the alleged coincidence of two Optional Clause declarations. All the intervening cases had been based either upon treaty clauses or upon special agreements. Yet withdrawals of Optional Clause declarations have invariably been accompanied by media statements, or even official statements, to the effect that the ex-declarant 'no longer accepts' or 'has turned its back on' or 'no longer acknowledges' the Court. Coupled with the actual paucity of declarations, this leads to a widespread public impression that the Court is just a small, ineffectual debating society, an impression which can only increase the scepticism with which recourse to it is frequently

viewed. It therefore behoves all concerned jurists to emphasize at every opportunity the fact that the Optional Clause is just one method of recourse to the Court, and in fact the one which, historically, is the least important. It is also not superfluous to emphasize that all members of the UN have *ipso jure* accepted the Court as an institution to which they may not shut their eyes.

TABLE I. DECLARATIONS UNDER THE PERMANENT
COURT OF INTERNATIONAL JUSTICE
(IN CHRONOLOGICAL ORDER)

- (a) = declaration signed without condition as to ratification
 (b) = declaration signed subject to ratification
 S = date of signature
 R = date of deposit of ratification
 T = year of expiration or termination of the latest declaration (during the time of the PCIJ)
 * = State whose latest declaration had expired or been terminated by 1945
 † = State whose declaration was not considered valid because the ratification required for the declaration, though made, was not deposited
 ‡ = State whose declaration was not considered valid because the Protocol of Signature of the Statute was not ratified

Denmark	(b) I: S before 28.I.21, R 13.VI.21; II: S 11.XII.25, R 28.III.26; III: S 4.VI.36, R?
Switzerland	(b) I: S before 28.I.21, R 25.VII.21; II: S 1.III.26, R 24.VII.26; III: S 23.IX.36, R 17.IV.37
Portugal	(a) S before 28.I.21, R 8.X.21
El Salvador	(a) S before 28.I.21, R 29.VIII.30
Costa Rica†	(a) S before 28.I.21
Uruguay	(a) S before 28.I.21, R 27.IX.21
Netherlands*	(a) I: S and R 6.VIII.21; II: S 2.IX.26; III: S 5.VIII.36, T 1943
Sweden	(a) I: S 16.VIII.21; II: S 18.III.26; III: S 18.IV.36
Norway	(b) I: S 6.IX.21, R 3.X.21; II: S 22.IX.26; III: S 19.V.36
Lithuania*	(a) I: S 5.X.21, R 16.V.22; II: S 14.I.30; III: S 8.III.35, R 12.III.35, T 1940

Panama	(a) S 25.X.21, R 14.VI.29
Brazil	(a) I: R 1.XI.21; II: S and R 26.I.37
Luxembourg	(b) I: S 1921; II: S and R 15.IX.30
Finland	(b) I: S 1921, R 6.IV.22; II: S 3.III.27; III: S 9.IV.37
Liberia†	(b) S 1921
Bulgaria	(a) S 1921, R 12.VIII.21
Haiti	(a) S 1921
Austria	(b) I: S 14.IV.22, R 14.III.22; II: S 12.I.27, R 13.III.27; III: S 22.III.37, R 30.VI.37
China*	(a) S 13.V.22, T 1927
Estonia	(a) I: R 2.V.23; II: S 25.VI.28; III: S 6.V.38
Latvia	(b) I: S 11.IX.23, R 12.II.24; II: S 10.IX.29, R 26.II.30; III: S 31.I.35, R 26.II.35
Dominican Republic	(b) S 30.IX.24, R 4.II.33
France*	(b) I: S 2.X.24; II: S 19.IX.29, R 25.IV.31; III: S 7.IV.36 (from 25.IV. 1936), T 1941
Belgium*	(b) S 25.IX.25, R 10.III.26, T 1941
Ethiopia*	(a) I: S 12.VII.26, R 16.VII.26; II: S 15.IV.32; III: 18.IX.34, T 1936
Guatemala†	(b) S 17.XII.26
Germany*	(b) I: S 23.IX.27, R 29.II.28; II: S 9.III.33, R 5.VII.33, T 1938
Hungary*	(b) I: S 14.IX.28, R 13.VIII.29; II: S 30.V.34, R 9.VIII.34; III: S 12.VII.39, R?, T 1939
Spain*	(a) S 21.IX.28, T 1938
Italy*	(b) S 9.IX.29, R 7.IX.31, T 1936
Greece*	(a) I: S 12.IX.29; II: S 12.IX.34, R 19.VII.35; III: S 8.IX.39, R 20.II.40, T 1944
Irish Free State	(b) S 14.IX.29, R 11.VII.30
Czechoslovakia†	(b) S 19.IX.29
Peru*	(b) S 19.IX.29, R 29.III.32, T 1942
Great Britain	(b) I: S 19.IX.29, R 5.II.30; II: S 28.II.40
New Zealand	(b) I: S 19.IX.29, R 29.III.30; II: S 1.IV.40
Union of South Africa	(b) I: S 19.IX.29, R 7.IV.30; II: S 7.IV.40
India	(b) I: S 19.IX.29, R 5.II.30; II: S 28.II.40
Australia	(b) I: S 20.IX.29, R 18.VIII.30; II: S 21.VIII.40
Canada	(b) S 20.IX.29, R 28.VII.30
Siam	(b) I: S 20.IX.29, R 7.V.30; II: S 3.V.40
Nicaragua†	(a) S 24.IX.29
Yugoslavia*	(b) S 16.V.30, R 24.XI.30, T 1935
Albania*	(b) I: S and R 17.IX.30; II: S 7.XI.35, T 1940
Persia	(b) S 2.X.30, R 19.IX.32

Romania*	(b) I: S 8.X.30, R 9.VI.31; II: S 4.VI.36, T 1941
Poland†	(b) S 24.I.31
Colombia	(a) I: S 6.I.32; II: S and R 30.X.37
Paraguay*	(a) Decree 14.I.33, R 11.V.33, T 1938
Argentina†	(b) S 28.XII.35
Turkey†	(a) S 12.IV.36
Bolivia	(a) S and R 7.VII.36
Monaco*	(a) S 22.IV.37, T 1942
Iraq†	(b) S 22.IX.38
Liechtenstein*	(a) S 22.III.39, T 1944
Egypt†	(b) S 30.V.39

TABLE II. DECLARATIONS UNDER THE INTERNATIONAL
COURT OF JUSTICE (IN CHRONOLOGICAL ORDER)
AS OF 31 MARCH 1987

The date referred to is the date of the deposit of the declaration; in cases where the date of signature differs, this is printed first.

* = State whose declaration has expired or was terminated

T = year of termination

E = year of expiration

Netherlands	I: 5.VIII.46; II: 1.VIII.56
United States*	14.VIII.46, 26.VIII.46 (modified 6.IV.84), T 1986
China*	26.X.46, T 1972
Norway	I: 16.XI.46; II: 17.XII.56, 19.XII.56; III: 2.IV.76
Denmark	I: 10.XII.46, 11.XII.46; II: 10.XII.56
Guatemala*	27.I.47, E 1952
France*	I: 18.II.47, 1.III.49; II: 10.VII.59; III: 16.V.66, 20.V.66, T 1974
Sweden	I: 5.IV.47; II: 6.IV.57
Turkey*	I: 22.V.47, 6.VI.47; II: renewed 8.VI.54 (from 22.V.52); III: renewed 7.VIII.58 (from 23.V.57); IV: renewed 19.III.64 (from 23.V.62); V: renewed 31.VIII.67 (from 23.V.67), E 1972
Philippines	I: 12.VII.47, 21.VIII.47; II: 23.XII.71, 18.I.72
Mexico	23.X.47, 28.X.47
Honduras	I: 2.II.48, 10.II.48; II: renewed 19.IV.54, 24.V.54; III: renewed 20.II.60, 10.III.60; IV: 22.V.86

Brazil*	12.II.48, 12.III.48, E 1953
Belgium	I: 10.VI.48; II: 3.IV.58, 17.VI.58
Bolivia*	5.VII.48, 16.VII.48, E 1953
Pakistan	I: 22.VI.48, 9.VII.48; II: 23.V.57; III: 12.IX.60, 13.IX.60
Switzerland	6.VII.48, 28.VII.48
Liechtenstein	10.III.50, 29.III.50
Israel*	I: 4.IX.50, 11.X.50; II: 3.X.56, 17.X.56 (modified 28.II.84), T 1985
Liberia	3.III.52, 20.III.52
Australia	I: 6.II.54; II: 13.III.75, 17.III.75
United Kingdom	I: 1.VI.55, 2.VI.55; II: 31.X.55; III: 18.IV.57; IV: 26.XI.58; V: 27.XI.63; VI: 1.I.69
South Africa*	12.IX.55, 13.IX.55, T 1967
Portugal	19.XII.55
India	I: 7.I.56, 9.I.56; II: 14.IX.59; III: 15.IX.74, 18.IX.74
Egypt	18.VII.57, 22.VII.57
Democratic Kampuchea (Cambodia)	9.IX.57, 19.IX.57
Sudan	30.XII.57, 2.I.58
Finland	25.VI.58
Japan	15.IX.58
Somalia	25.III.63, 11.IV.63
Uganda	3.X.63
Kenya	12.IV.65, 19.IV.65
Nigeria	14.VIII.65, 3.IX.65
Gambia	14.VI.66, 22.VI.66
Malawi	22.XI.66, 12.XII.66
Malta	I: 29.XI.66, 6.XII.66; II: 2.I.81, 23.I.81; III: 2.IX.83
Mauritius	4.IX.68, 23.IX.68
Swaziland	9.V.69, 26.V.69
Botswana	14.I.70, 16.III.70
Canada	I: 7.IV.70; II: 10.IX.85
Austria	28.IV.71, 19.V.71
Costa Rica	5.II.73, 20.II.73
El Salvador	I: 26.XI.73; II: renewed 24.XI.78 (from 26.XI.78)
New Zealand	22.IX.77
Togo	24.X.79, 25.X.79
Barbados	24.VII.80, 1.VIII.80
Senegal	I: 2.V.85, 3.V.85; II: 2.XII.85

TABLE III: DURATION OF DECLARATIONS UNDER THE PERMANENT COURT OF INTERNATIONAL JUSTICE

The year in parenthesis is the year in which the acceptance became effective. When the year of signature differs, this is indicated by 's'.

† = declaration not valid because the Protocol of Signature of the Statute was not ratified

‡ = declaration not valid because the required ratification of the declaration was not deposited

1. *Declarations valid for a fixed period*

(1) Five-year period

Denmark I (1921), Switzerland I (1921), Netherlands I (1921), Sweden I (1921), Norway I (1921), Lithuania I (1921), Brazil I (1921), Luxembourg I (1921), Finland I (1921), Austria I (1922), China (1922), Estonia I (1923), Latvia I (1923s, 1924), Ethiopia I (1926), Germany I (1927s, 1928), Hungary I (1928s, 1929), Italy (1929s, 1930), Latvia II (1929s, 1930), France II (1929s, 1931), Greece I (1929), Lithuania II (1930), Yugoslavia (1930), Albania I (1930), Romania I (1930s, 1931), Poland (1931s)†, Germany II (1933), Greece II (1934s, 1935), Hungary II (1934), Lithuania III (1935), Albania II (1935), France III (1936), Turkey (1936s)‡, Romania II (1936), Austria III (1937), Monaco (1937), Liechtenstein (1939), Egypt (1939s)‡, Greece III (1939s, 1940)

(2) Ten-year period

Denmark II (1925s, 1926), Switzerland II (1926), Netherlands II (1926), Sweden II (1926), Norway II (1926), Finland II (1927), Austria II (1927), Estonia II (1928), Spain (1928), Czechoslovakia (1929s)†, Peru (1929s, 1932), Siam I (1929s, 1930), Argentina (1935s)‡, Bolivia (1936), Denmark III (1936), Switzerland III (1936s, 1937), Netherlands III (1936), Sweden III (1936), Norway III (1936), Brazil II (1937), Finland III (1937), Estonia III (1938), Siam II (1940)

(3) Fifteen-year period

France I (1924), Belgium (1925s, 1926)

(4) Twenty-year period

Irish Free State (1929s, 1930)

(5) Two-year period

Ethiopia II (1932), Ethiopia III (1934)

(6) With a specified date of termination

Hungary III (1939)

2. *Declarations with a fixed period automatically renewed unless a six-month advance notice is given*

Luxembourg II (1930)

3. *Declarations which do not contain any reference to duration*
 Portugal (1921), Salvador (1921s, 1930), Costa Rica (1921s)†, Uruguay (1921), Liberia (1921s)†, Bulgaria (1921), Haiti (1921), Panama (1921s, 1929), Dominican Republic (1924s, 1933), Guatemala (1926s)†, Nicaragua (1929s)†, Colombia I (1932), Paraguay (1933), Colombia II (1937)
4. *Declarations valid until notice of termination is given*
 - (1) With initial ten-year period
 Great Britain I (1929s, 1930), India I (1929s, 1930), New Zealand I (1929s, 1930), Union of South Africa I (1929s, 1930), Canada (1929s, 1930), Australia I (1929s, 1930)
 - (2) With initial six-year period
 Persia (1930s, 1932)
 - (3) With initial five-year period
 Latvia III (1935), Iraq (1938s)†, Great Britain II (1940), India II (1940), New Zealand II (1940), Australia II (1940)
 - (4) Without initial period of validity
 Union of South Africa II (1940)

TABLE IV: DURATION OF DECLARATIONS UNDER THE
INTERNATIONAL COURT OF JUSTICE

The year in parenthesis is the year in which the acceptance became effective. When the year of signature differs, this is indicated with 's'.

- × = declarations which were terminated but replaced by new declarations
 * = declarations which simply expired or were terminated

1. *Declarations valid for a fixed period*
 - (1) Period of five years
 Guatemala (1947)*, Turkey I (1947)[×], Brazil (1948)*, Belgium I (1948)[×], Bolivia (1948)*, Israel I (1950)[×], Turkey II (1952)[×], Turkey III (1957)[×], Turkey IV (1962)[×], Turkey V (1967)*, El Salvador I (1973)[×]
 - (2) Period of six years
 Honduras I (1948)[×]
 - (3) Period of ten years
 Norway I (1946)[×], Denmark I (1946)[×], Sweden I (1947)[×], El Salvador II (1978)
 - (4) With fixed period automatically renewed
 Honduras II (1954)[×], Costa Rica (1973)

2. *Declarations with a fixed five-year period automatically renewed unless an advance notice of six months is given*
Netherlands II (1956), Norway II (1956)[×], Denmark II (1956), Sweden II (1957), Finland (1958), Norway III (1976)
3. *Declarations which do not contain any reference to duration or are made for an indefinite or unlimited period*
Egypt (1957), Honduras III (1960)[×], Uganda (1963), Nigeria (1965), Malawi (1966), Swaziland (1969), Botswana (1970), Togo (1979), Senegal I (1985)[×], Senegal II (1985), Honduras IV (1986)
4. *Declarations valid until notice of termination is given*
 - (1) With initial fixed period of validity
 - (i) Ten years
Netherlands I (1946)[×], Philippines I (1947)[×], Cambodia (1957)
 - (ii) Five-year period
Pakistan I (1948)[×], France I (1947s, 1949)[×], Liberia (1952), Belgium II (1958), Japan (1958), Austria (1971)
 - (iii) Initial three year period
France II (1959)[×]
 - (iv) Initial one-year period
Portugal (1955)
 - (2) Without initial fixed period of validity
Australia I (1954)[×], United Kingdom I (1955)[×], United Kingdom II (1955)[×], South Africa (1955)*, India I (1956)[×], Israel II (1956)*, Sudan (1957s, 1958), Pakistan II (1957)[×], United Kingdom III (1957)[×], United Kingdom IV (1958)[×], India II (1959)[×], Pakistan III (1960), Somalia (1963), United Kingdom V (1963)[×], Kenya (1965), France III (1966)*, Gambia (1966), Malta I (1966)[×], Mauritius (1968), United Kingdom VI (1969), Canada I (1970)[×], Philippines II (1971s, 1972), India III (1974), Australia II (1975), Barbados (1980), Malta II (1981)[×], Malta III (1983), Canada II (1985)
5. *Declarations valid until advance notice of termination of six months or one year is given*
 - (1) One year
Switzerland (1948), Liechtenstein (1950)
 - (2) Six months
United States (1946)*, China (1946)*, Mexico (1947), New Zealand (1977) (these four declarations all had an initial five year period in common)

TABLE V: RESERVATIONS OF THE RIGHT OF IMMEDIATE AMENDMENT

× = declarations which were renewed or terminated but replaced by new declarations

* = declarations which simply expired or were terminated

Portugal (1955), Somalia (1963), Kenya (1965), France III (1966)*, Malta I (1966)[×], Malawi (1966), Mauritius (1968), United Kingdom VI (1969), Swaziland (1969), Botswana (1970), Canada I (1970)[×], El Salvador I (1973)[×], Norway III (1976), New Zealand (1977), El Salvador II (1978), Togo (1979), Malta II (1981)[×], Malta III (1983), Senegal I (1985)[×], Canada II (1985), Senegal II (1985), Honduras IV (1986)

THE INTERNAL JUDICIAL PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE*

By SIR ROBERT JENNINGS¹

I. INTRODUCTION

THE broad theme of this article is the place and purpose of the International Court of Justice in contemporary international relations. That Court is a permanent court and its constituency is the world. Consequently it is crucially, intimately and inescapably concerned with the development and shaping of international law to a far higher degree than *ad hoc* tribunals which are, certainly not wholly, yet undoubtedly primarily, concerned with the satisfactory disposal of particular disputes. This way of stating the role of a permanent court is of course a truism and found in all the books. It is, however, the converse of this relationship of the Court and the law it administers to which the author wishes here to call attention: not so much the way the Court affects the law, as the way the law affects the Court. We shall, accordingly, examine the ways in which the performance of this role of permanent court and world court crucially affects the position and attitude of the Court, even to the extent of the requirements of its own internal judicial practices and the ways in which it conducts, not its public sessions, but rather its deliberations and its decision-making in its private and confidential sessions. The most important conclusion that should probably be drawn from this examination may be stated at once: the urgent and indeed desperate need for a far wider dissemination, amongst thinking and responsible people in all countries, of some elementary information about both the law and the Court; in a word, the need for elementary legal education at the international level. Since it is perhaps well to deal with some wider issues first, and come to the more technical and domestic ones later, one might conveniently begin with a particular effect of this lack upon the authority of the Court.

An initial problem is one simply of awareness; or rather the lack of awareness by educated and thinking laymen, of both the reality of the system of public international law, and of the role of the Court or even of its existence. It is not enough that the law be applied: it must be seen generally

* © Judge Sir Robert Jennings, 1989.

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that a system of law is being applied, if there is to be a sufficient consciousness of the existence of an ordering of international society, which ordering is the product of an actual system of law. It is not enough that the legal departments of foreign offices, or of some multinational corporations, are entirely aware of the reality of international law. A general awareness of the reality of a system of law is a condition of its authority and effectiveness. It may be useful to mention some reasons for this lack of awareness, other than in professional circles, of the undoubted reality and actuality of public international law.

In the last few decades international law has undergone a remarkable expansion in both content and modes of operation. Many international lawyers of a certain age can easily recall the time when to assert that international law could apply to individuals was to risk being thought eccentric. Today a great deal of international law—especially, but not only, treaty law—is about individuals, or affects them closely. It is often a matter of some surprise to the professional international lawyer that people can in their masses undertake journeys by air traversing several different sovereignties, or even receive letters from abroad, without realizing that there must be some sort of international law to render these things possible. Indeed the fact of the matter is that the individual is nowadays often subjected to international treaty law in ordinary, every-day matters; for example, the liability of the air carrier to which he trusts his person and his luggage. But this kind of international law, which applies to the individual, is commonly applied and enforced by its being first transformed into municipal law, whether by municipal legislation or by executive action. It therefore appears before the individual, not as international law at all, but as English law, or German law, or whatever domestic system the individual lives under. And the courts which are seen by him to be applying this law are again his own domestic courts. It is certainly a most important added strength to public international law that so much of it is now applied by domestic courts, and enforced if need be with all the resources of the sovereign State. Yet this is also a weakness in that so much of this international law appears as it were in a very effective disguise, before the persons to whom it is applied. Moreover, much routine international law of another sort—that between governments such, for example, as the modalities of making treaties—works so smoothly and is so generally observed and applied, that it escapes any attention other than from persons immediately concerned. Accordingly, even the highly educated with some interest in law can easily mislead themselves into believing that international law applies only to governments, that treaties are concerned only with political matters, and are generally disregarded by governments whenever convenient, and that much international law is not actual but in the nature of perhaps idealistic proposals not yet really law at all. This very common layman's impression of international law he cannot help comparing in his own mind with the pervasive presence of the domestic system of law under which he lives, whose courts he passes

on his own high street, and of whose actuality he is constantly reminded by his newspapers, or even by receipt of a demand from his tax authorities.

By comparison, the International Court of Justice must often seem distant indeed, if it appears to the layman's vision at all. For, after all, it is operating under a Statute the essentials of which were drafted after the First World War, and when therefore Article 34, providing that only States could appear before it, confined its activities to just those aspects of modern international law which are most likely to seem incomprehensible to the layman, and the reports of which are accordingly often not supposed to be newsworthy by the media: even it seems when the subject-matter of the decisions is of the greatest practical and immediate political, economic, financial and strategic importance, such as the continental shelf boundaries in the central Mediterranean, the recent important judgments on which passed almost unnoticed by the media of all kinds. Thus, at a time when the Court's list of active cases is longer and more substantial than at any previous time in its history, the man in the street seems still to be invincibly ignorant even of its existence.²

This dangerous weakness—essentially a gap in general education for citizenship—is not one the Court itself can do much about. Still, it is mentioned here because it is one that affects the Court especially. An *ad hoc* arbitral tribunal is often doing its particular job most effectively when it is able to dispose of a dispute quietly and with the minimum publicity. The Court on the other hand, with its responsibilities as the 'principal judicial organ of the United Nations', actually needs publicity in order to do its job properly. A world court, if it is to be that, cannot afford to be only the esoteric study of a small band—really *very* small, though it is world-wide—of specialists in public international law.

There is one matter in which it might, at first sight, be supposed that the Court could help itself. Great and influential judges of municipal higher courts have usually been very much aware that, in their judgments, they should be addressing a much wider audience than the parties and their lawyers. Pronouncements of the International Court of Justice tend to be far too long and in their language sometimes seem to be addressed not so much to the world at large as to the small international law establishment. Yet, as will be seen more clearly later, it is the very fact that it is striving to act as a world court that requires that its judgments and opinions must in effect be the work of a large committee, accommodating perhaps several shades of opinion, rather than reflecting the consistent style of one personality, such as the pronouncements of a Mansfield, or in our days, of a Denning. But this is to anticipate a dilemma to which we shall have to return later on.

* * *

² The International Court of Justice is not alone in this. See the complaint by Lord Mackenzie Stuart, President of the European Community Court in Luxembourg, that that Court 'has made hundreds of rulings demolishing trade barriers, with scant recognition for its efforts'; and that 'Britain's

There is another aspect of contemporary international law which is critical for any understanding of the Court's work and of the ways in which it must set about it. There is no need to labour the fact that there are nowadays important areas of international law, and more especially those that fall to the International Court of Justice, the meaning and content of which is highly controversial; and that the different views are not merely technical, but are the product of opposed political postures, economic interests, power clashes and the like. Examples are not for to seek: the legal status of the provisions of the 1982 Law of the Sea Convention and deep-sea mining; the legal position of the West Bank; 'international terrorism' and/or 'freedom-fighters'; important areas at the interface of 'human rights' and 'domestic jurisdiction'; the 'new international economic order'; and those new perspectives on large areas of international economic, financial and technological matters comprised within 'development law'. These are only the more obvious examples. There are indeed few international law issues of the kind that might be worth litigating at The Hague—as contrasted with the very large areas of rules which are well known, generally accepted and routinely used and applied by governments—which are not in some measure doubtful and controversial and for which the choice of legal answer can only be a decision with an important political content. Of course there can be issues even of international law where the choice to be made is mainly or even wholly technical; where, so to speak, passion has been tamed by the law. But they do not seem to be the kind of issue that governments want to submit to the Court.

Let it be said with no uncertain voice that this present quasi-political turmoil of contemporary international law is not a matter for dismay, but on the contrary. It is no small reason for optimism that the main issues of this troubled and divided world are actually expressed by governments in terms of international law; moreover that they find it necessary to do so. It is a cause for puzzlement that this impact of international law on the main issues of international relations is so often barely noticed, not only by the media commentators but even by serious academic students of these matters; the explanation can only be the power of traditional habits of thought, and the constant tendency, especially of academics, to suppose that what is not taught as part of the syllabus does not exist, or at least must be unimportant.

The aspect we are concerned with is, however, a different one. In so far as such matters come before the International Court of Justice for decision—and they do so increasingly, as a glance at recent *Reports* or the present list of cases will show—the Court is faced with tasks which are as increasingly delicate as they are increasingly important. For binding decisions have to be made, and have to be made on an oecumenical basis;

coverage of the court's work is pretty shocking. But other countries are equally bad.' (See *The Times*, 8 August 1988, p. 6.) Yet it would be fair to say that, in Europe at least, people are much more aware of the Luxembourg court than they are of the Hague one.

and they have to be such as prove, at least in the long run, acceptable to the majority of governments and thus truly settling points that have been put in issue before the Court. How does it then in practice set about its difficult task? We may now turn to the more technical side of the Court's practice and procedures; not so much as a technical study of procedural rules as to examine how far the procedure does enable the Court to make a useful attempt at fulfilling its weighty task; and not least to try to understand some aspects of the Court's endeavours to fulfil its role faithfully, which are not perhaps as generally appreciated as they might be.³

* * *

The membership of the Court comprises fifteen judges, and Article 9 of the Court's Statute requires the electors at every election to 'bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured'. The intention of this provision is presumably something more than the attainment of an approximation to a fair distribution of membership; it is surely that the 'principal judicial organ of the United Nations'⁴ should broadly be representative of different parts of the world and of all the principal legal systems. In a word, if the Court is to speak with the authority of a world court—and this is essentially a question of authority—it must itself be a world court; only thus can it acceptably promulgate generally binding interpretations, applications and developments of international law. Though seated in The Hague, it must be seen to be global in its collective thinking.

Yet even a generally representative membership is only the beginning of what is required. That oecumenical quality must also persist in the decision-making process itself; so, both the procedural rules and the traditions of the place ought to be designed above all to ensure that, as far as may be, all the members of the Court take a part in all parts of the process of decision and the drafting of a judgment.

How this is in fact sought to be achieved we shall come to in a moment, but first it is necessary to point out there is a price to be paid for assuring this quality in the Court's procedures; and this is what is perhaps most often overlooked. It is simply not possible for a court of fifteen judges, if they are indeed all of them conscientiously to take a full part at all stages of a case, to work within the time-scale that, for instance, a domestic court of final appeal might be expected to achieve. It is perhaps natural for outside

³ It should be added that the present study is concerned with decisions by the full Court. The question of the use of chambers, though by no means unrelated to the matters under discussion in this article, does call for separate treatment. See, however, the study by Judge Schwebel, 'Ad Hoc Chambers of the International Court of Justice', *American Journal of International Law*, 81(1987), p. 831.

⁴ Article 1.

observers of the Court to compare the case-load of the International Court of Justice, even when it feels itself to be extended almost to the limit, with the typical case-load of any busy domestic court of appeal, and to conclude from the comparative figure that the International Court of Justice has rather little to do, and that membership of the Court is an enviable sine-cure. But this is not to compare like with like. Indeed the way in which the International Court of Justice ought to work and does work is not even comparable with an *ad hoc* arbitration; for here there is usually a bench of not more than five judges, chosen normally according to the parties' own ideas of suitable judges for the particular case and not at all in a representative capacity as members of a standing court.

It should be added, lest the position be misunderstood in a different way, that these observations are in relation to the actual work-load upon members of the Court and its very small secretariat; they are not in relation to the period of time between the initiation of a case and final judgment. That period, exactly as in other courts, depends very much upon the time taken by the parties to plead. Most long delays are at the behest of the parties—not necessarily a bad thing because delayed justice may sometimes serve to ameliorate a delicate situation. In any event, the time that elapses between application and judgment compares very well with domestic courts of appeal.

II. THE COURT'S INTERNAL PRACTICE

After these more general considerations, we may now turn to the judicial practice of the Court and examine the ways in which it endeavours to ensure that it acts as a world court, in accordance with the intention of Article 9; and as a consequence, it may then be hoped, will make decisions that carry the authority appropriate to such a high calling. It will be convenient to begin this description of the procedure from the time when the oral proceedings are terminated, and after the time needed to allow judges to study the transcripts of the oral arguments (each of which, it should be remembered, has had to be translated into French or English, depending on the language of the original argument). Thus, we begin with Article 3 of the current Resolution concerning the Internal Judicial Practice of the Court.⁵

This article brings us straight up against the word 'deliberation', which occurs several times in these practice rules, and is the principal means by which the Court sets itself upon its journey to decision and judgment (or, of

⁵ Adopted on 12 April 1976. It is conveniently printed in the UN publication (Sales no. 428), *Charter of the United Nations, Statute and Rules of Court and Other Documents* (1977). This was a revision of the Resolution of 5 July 1968, before which the practice was governed by the Resolution of the Permanent Court of International Justice of 20 February 1931, as amended on 17 March 1936, and carried over to the new Court in 1946.

course, opinion in the case of a request for an advisory opinion). The term deliberation is plain enough and self-explanatory. Yet one point, peculiar to the International Court of Justice at any rate in its degree of incidence, must be brought out immediately.

A meeting of the Court for a deliberation will normally be of the fifteen members (perhaps also one or two judges *ad hoc*). Thus, at least fifteen and possibly as many as seventeen persons will expect to speak at least once and possibly more often.⁶ It is obvious, therefore, that the kind of informal, more conversational consideration of the issues, which would be possible in a smaller committee, is not possible at a convocation of the full Court. The only way in which such a body can deliberate is to adopt a somewhat disciplined procedure. Accordingly, as the practice resolution has it, 'Judges will be called on by the President in the order in which they signify their desire to speak',⁷ though, naturally, the President in his discretion may permit occasional departures from this rule. For instance, if a member wishes, through the President, to ask another member a particular question, it would be tiresome if he had to wait perhaps through several interventions dealing with quite other matters, before receiving his answer. In general, however, there cannot be a duologue. Members can present their arguments, and take account of, and comment on, the arguments of other members; but the close give-and-take of argument is not normally possible. It is obvious that these limitations on the formal deliberation could be remedied by referring the case to a small committee for the kind of close discussion and argument that is possible in such a committee. And indeed this may be done for the closer investigation of particular points, or differences of opinion, and to report back to the full Court. But the actual decisions must be taken by the full Court in its formal meetings, if the spirit of Article 9 of the Statute is to be fulfilled, and if the decision is to carry in the outside world that authority which can, in present times at least, only come from the full conference together of all those who have been chosen to be representative of the main forms of civilization and the principal legal systems of the world.

It does not of course follow that there are no discussions. It only follows that they have to be informal, and quite apart from the formal deliberations, in small groups, or between two members. Such discussions and arguments are obviously of great importance in providing a sort of leaven for the formal deliberations. They easily happen in a pleasant building⁸ in

⁶ Deliberations are also governed by Article 33 of the Rules of Court:

'Except as provided in Article 17 of these Rules, Members of the Court who have been replaced, in accordance with Article 13, paragraph 3, of the Statute following the expiration of their terms of office, shall discharge the duty imposed upon them by that paragraph by continuing to sit until the completion of any phase of a case in respect of which the Court convenes for the oral proceedings prior to the date of such replacement.'

⁷ The rule is different, however, in an 'Article 5 deliberation', which is described below.

⁸ The judges' chambers are now in the new building situated behind the old Peace Palace. The Peace Palace was opened in 1913; the new building was opened in 1978.

which all the judges have chambers next to or within easy reach of each other, in which the corridors and landings are such that the members inescapably see and meet each other probably several times a day, and where there is a clubbable tradition by which members tend to be constantly in and out of each others' chambers. Thus the atmosphere encouraging relaxed and informal exchange and discussion of ideas, but coupled with formal and structured deliberations—the latter requiring one to collect and discipline one's ideas in a way lending itself to a reasonably short presentation—do together, provided adequate time is allowed for this time-consuming general maturing of views, make for a very thorough joint effort which, in so mixed a body, is, be it said, a very considerable achievement.

Having now understood something of the meaning of a 'deliberation', we may resume the recital of the successive procedures laid down by the articles of the internal judicial practice resolution; and return accordingly to the 'Article 3 deliberation' following the brief period for assimilation of the arguments of the parties in the now concluded oral proceedings.

(a) *Article 3 Deliberation*

The Article 3 deliberation is preliminary, and has the main purpose of identifying the principal issues that have to be tackled. Judges are 'called upon by the President in the order in which they signify their desire to speak'. According to the article, the deliberation is the one 'at which the President outlines the issues which in his opinion will require discussion and decision by the Court'. In practice he does this by submitting a written list of the main issues and questions which seem to arise in the case, briefly indicating also the respective arguments of the parties on these matters, and where these may be found in the pleadings or transcripts. There is a discussion of this paper, and as a result it may be agreed to add issues, or to delete issues, or to redraft the way in which they are expressed. This deliberation is not, however, confined to the list of issues, and 'The President also invites judges to indicate their preliminary impressions regarding any issue or question'. This they may or may not wish to do at this stage.

(b) *The Written Notes*

Next comes what may conveniently be called the Article 4 stage, and Article 4 may be quoted in full:

(i) At a suitable interval of time after this deliberation, each judge prepares a written note which is distributed to the other judges.

(ii) The written note expresses the judge's views on the case, indicating, *inter alia*:

(a) whether any questions which have been called to notice should be eliminated from further consideration or should not, or need not, be decided by the Court;

- (b) the precise questions which should be answered by the Court;
- (c) his tentative opinion as to the answers to be given to the questions in (b) and his reasons therefor;
- (d) his tentative conclusion as to the correct disposal of the case.

Several observations need to be made about this very important stage of the procedure. Whatever may have been the interpretation of the term 'note' in earlier days, the judges' notes tend now to be considerable studies of the issues and the law involved in the entire case; and are in a more or less extended form, sometimes amounting to several score of pages. Each note is an individual effort. At this stage each judge is so to speak on his own, though obviously some will find it useful and perhaps stimulating to continue informal discussions with colleagues. A glance at the very small complement of juridically trained staff in the Court's Registry will easily demonstrate that no research assistance can be expected; in fact every judge has to do his own research, though the staff of the Court's own working library will assist by having likely books and articles and materials ready to hand, distributing a bibliography, and providing generally the services a scholar would expect to find in a good, specialized library.⁹ For every one of fifteen or more judges independently to do the same task seems at first sight an odd way of setting about arriving at a decision. Yet for each judge to impose upon himself the discipline of so marshalling and crystallizing his thoughts is a sure way of ensuring that every judge equips himself for taking a full part in the case.¹⁰ Indeed if, at this vital initial stage, the construction of a single working scheme of decision and exposition were to be allotted to a small team, it is difficult to see how such a team could be chosen whilst still safeguarding the principle that *every* judge ought to be able to take a full part in the decision-making. In the search for greater efficiency and time-saving, the principle underlying Article 9 of the Statute would have been sacrificed.

Accordingly, the practice of the Court goes even further than the letter of the resolution might require: a judge receives copies of the notes of his colleagues (in the first instance without the names of the authors being provided) only after he has finally deposited his own note with the Registrar. So this mechanism of the notes ensures, as far as maybe, that every judge begins by himself working independently upon his note. After distribution, the reading of up to seventeen rather full 'notes' is itself a fairly lengthy business—indeed, needs to be done without undue pressure if the notes are to be properly perused and thought over; and there is again a considerable pressure on translator resources, for *every* note has to be translated

⁹ There is nothing akin to the system of judges' clerks. This is not only because of budgetary constraints. There has been a general feeling that judges are supposed to be qualified to do their own juridical research. Besides, there are security considerations and, not least, budget considerations.

¹⁰ This cerebral discipline of having to set views down on paper is important. The author heard an experienced appeal judge of a famous domestic court, when asked about the processes of trying a case, explain it thus: my mind is not in my head but resides at the tip of my pencil.

(obviously it would be out of the question to translate only selections; and who would select?).

Finally, of this stage, it should be noted that the use of the word 'tentative' twice over in Article 4 makes it clear that, however strongly a judge may argue in his written note, he is not committed to that view.

(c) *Article 5 Deliberation*

The next stage,—after a convenient interval for the study, and perhaps informal discussion of the written notes—is what may be called the Article 5 deliberation. This is the deliberation, probably lasting several days, in which judges 'must declare their views'; and at these meetings they are called upon by the President, not in order of their signifying a desire to speak, but 'in inverse order of seniority'. Thus junior judges are not to be allowed, before declaring their views, to wait to see which way the wind is blowing.¹¹ Having declared his views, each judge may be asked questions, exposed to critical comments, and in general subjected to a juridical cross-examination to test the validity of his views. Since the order is in the inverse of seniority, it follows that the President will speak last, and his statement may well be not only a personal one but also include a summing-up of what seem to have been the main tendencies of the deliberation.

In any event it will have emerged, first from the study of the written notes, and then as the Article 5 deliberation has proceeded, where the majority view is to be found. The next stage must therefore be to reach a first draft of a judgment (or opinion) which will 'most closely and effectively' reflect 'the opinion of the Court as it appears then to exist'.¹²

(d) *The Drafting Committee*

The actual drafting of a preliminary judgment is not something that could be done at a meeting of the whole Court. Accordingly, this is the stage at which some modification of the principle of participation of all the judges must be accepted, though as we shall see only temporarily, and a drafting committee is appointed. If the President is with the majority he will automatically be the presiding member of the committee. So it is often only two others who have to be chosen, and this is done by absolute majority votes in a secret ballot, though of course before the ballot there will

¹¹ The full text of Article 5 is:

'(i) After the judges have had an opportunity to examine the written notes, a further deliberation is held, in the course of which all the judges, called upon by the President as a rule in inverse order of seniority, must declare their views. Any judge may address comments to or ask for further explanations from a judge concerning the latter's statement declaring his views.

(ii) During this deliberation any judge may circulate an additional question or a reformulation of a question already brought to notice.

(iii) On the request of any judge the President shall ask the Court to decide whether a vote shall be taken on any question.'

¹² See Article 6.

probably have been informal discussions. In any event there are certain obvious desirable requirements for members of the committee, besides being amongst 'those judges whose oral statements and written notes have most closely and effectively reflected the opinion of the majority of the Court as it appears then to exist':¹³ ability to draft in the drafting language (normally chosen by the President); where possible, at any rate an understanding of the other language; and indeed being in a position—in state of health, or other commitments to the work of the Court, and the like, as well as inclination—to undertake typically three weeks or more of the intensive and usually exhausting work of writing drafts, discussing them in numerous meetings of the committee, redrafting, abandoning cherished solutions and starting again, and the like.

The Registrar and Registry staff during the period of drafting make it their first duty to assist the drafting committee; the Registrar and usually at least one other member of his staff will sit with the committee. The Registry itself undertakes responsibility for producing the first draft of the '*qualités*', that is to say, the statement of facts and the summary of the arguments and contentions of the parties. Needless to say, translators from the Registry staff will again be kept exceedingly busy translating drafts to the satisfaction of the committee.

On the completion of the 'preliminary' draft it is circulated to the other judges, in the two languages *en regard*, and with numbered lines as well as paragraphs, for easy reference. Judges who wish to do so may submit amendments in writing. 'The drafting committee, having considered these amendments, submits a revised draft for discussion by the court in first reading.'¹⁴ The committee's work, however, is by no means finished. It

¹³ Article 6 in its entirety is as follows:

'(i) On the basis of the views expressed in the deliberations and in the written notes, the Court proceeds to choose a drafting committee by secret ballot and by an absolute majority of votes of the judges present. Two members are elected who should be chosen from among those judges whose oral statements and written notes have most closely and effectively reflected the opinion of the majority of the Court as it appears then to exist.

(ii) The President shall ex officio be a member of the drafting committee unless he does not share the majority opinion of the Court as it appears then to exist, in which case his place shall be taken by the Vice-President. If the Vice-President is ineligible for the same reason, the Court shall proceed, by the process already employed, to the election of a third member, in which case the senior of the elected judges shall preside in the drafting committee.

(iii) If the President is not a member of the drafting committee, the committee shall discuss its draft with him before submitting it to the Court. If the President proposes amendments which the committee does not find it possible to adopt, it shall submit the President's proposals to the Court together with its own draft.'

¹⁴ Article 7, which in its entirety is as follows:

'(i) A preliminary draft of the decision is circulated to the judges, who may submit amendments in writing. The drafting committee, having considered these amendments, submits a revised draft for discussion by the Court in first reading.

(ii) Judges who wish to deliver separate or dissenting opinions make the text thereof available to the Court after the first reading is concluded and within a time-limit fixed by the Court.

(iii) The drafting committee circulates an amended draft of the decision for the second reading, at which the President enquires whether any judge wishes to propose further amendments.

(iv) Judges who are delivering separate or dissenting opinions may make changes in or additions to their opinions only to the extent that changes have been made in the draft decision. During the second

remains in being till the judgment (or opinion) is finally voted upon though, as always, as a drafting instrument to be used by the whole Court.

The next stage is the first reading of the draft, and this stage again is so important, and involves so many matters of principle, that it requires a commentary on its own.

(e) *The First Reading*

The first reading reverts to the principle of the work of the Court being done by the whole Court, although the drafting committee remains in being to serve as the instrument of the whole Court. The first reading is literally a reading, and is done paragraph by paragraph. The procedure for each separate paragraph is as follows. The paragraph is read aloud, by a member of the Registry staff, in the drafting language, then read aloud, usually by another member of the Registry staff, in the other language.

This reading aloud accomplished, the President will then call upon a member of the drafting committee to explain which of the submitted amendments have been incorporated in the draft, and why; and which have not been adopted by the Committee, and the reasons for their rejection. He will also point out and explain any changes the committee has made *proprio motu* since the first draft was circulated. Then follows a general discussion, judges speaking normally in the order of their signifying a desire to speak. New amendments may still be suggested. The discussion of earlier changes, whether or not they have been accepted or adopted by the committee, may be reopened, and the decisions of the drafting committee contested. It is still possible to suggest changes ranging from deletion of the paragraph to rewriting it in its entirety. In short, this is the moment for an examination in depth and detail of the draft, by the whole Court. Straight-forward agreed changes may be made round the table. More substantial changes may be left to the drafting committee to draft at greater leisure. Thus it is true to say that every phrase of the draft is considered by the whole Court. Naturally enough some paragraphs will be passed over with little comment. Others may take a very considerable time to discuss. It is well understood that every judge must be allowed his say.

(f) *Separate Opinions*

By this stage of the proceedings, some judges will be contemplating making separate opinions; some of these will be expecting to vote partly or entirely with the expected majority; some of them will be contemplating dissent. For separate opinions, whether assenting or dissenting, there are certain rules which must now be mentioned, and which are concerned with

reading they inform the Court of any changes in or additions to their opinions which they propose to make for that reason. A time-limit is fixed by the Court for the filing of the revised texts of separate or dissenting opinions, copies of which are distributed to the Court.'

the relationship between the Court's draft and the separate opinions. However, first it is important to mention here a major principle, which these rules assume; and that is that even dissenting judges will continue, as members of the full Court, to work with the Court and its drafting committee on the Court's judgment (or opinion), not only throughout the first reading but also at the second reading and until the final vote. This is indeed what happens in accordance with a strong tradition. The judges intending to dissent from the Court's decisions will continue till the final moment to work with their colleagues on the improvement and clarification of the Court's own draft. In this sense at least the judgment or opinion of the Court is always the result of the work of *all* its members.

The first rule about separate or dissenting opinions is that the text must be made available to the Court after the first reading is concluded and within a time-limit fixed by the Court.¹⁵ This time-limit will also be before—normally some days before—the date for the second reading. This is in order that the drafting committee can take account of separate opinions in the revised draft submitted to the Court for the second reading. It may wish to answer a point made in a separate opinion. It may decide to delete a passage of its own draft, which passage has been effectively criticized, and to rely on alternative and better arguments. Conversely, separate opinions, once submitted by the due date, may not be changed, except 'only to the extent that changes have been made in the draft decision'; and the authors must inform the Court of any such changes, and the reasons therefor, at the second reading.¹⁶ Thus, again, the whole Court is much involved in the separate, even in dissenting, opinions, just as the judges making separate opinions are all the time involved in the Court's own decision. And although judges are free to express their own opinions, dissenting or otherwise, in separate opinions, the form they take may be commented upon by other members of the Court at the second reading. Indeed, the Court has the power, which is seldom exercised, to request deletions or changes in separate opinions.

This very important aspect of separate, including dissenting, opinions is insufficiently appreciated. The judgment of the Court and the separate opinions belong to each other, and, ideally, illuminate each other. An opinion may, for example, be devoted to elaborating a point of the judgment which could not be treated at length in the judgment, or which the author of the opinion is perhaps particularly well-qualified to explain. Where arguments alternative to those of the judgment are offered—even dissenting arguments—this can show the range from which the Court has chosen its stance. This in itself can help to place the Court's decision in its correct juridical context. But the importance of separate opinions as an integral part of the corpus of the Court's jurisprudence has nowhere been

¹⁵ Article 7 (ii).

¹⁶ Article 7 (iv).

better stated than in Fitzmaurice's introductory explanation of his magisterial studies of the work and procedure of the Court.¹⁷

Although the International Court of Justice has, in comparison with its predecessor, the Permanent Court of International Justice, only been in existence for a short time, and has not had the opportunity of pronouncing upon more than a relatively small number of cases, it has nevertheless produced a considerable volume of authority on points of general interest to international lawyers. It is the purpose of the present study to call attention to the existence of this body of statements of principle, by extracting and assembling in classified form, and with such comment as may be necessary to explain their bearing and effect in the context in which they were made, all the conclusions and findings of the Court (and, within certain limits, of individual Judges) presenting features of general interest from the standpoint of international law and procedure. It follows that the object is both a specialized and a limited one: in particular, it is not the intention to give an account of, or to comment on, the cases *as such* with which the Court has been called upon to deal. So far as the present study goes, these cases are the framework within which the Court has made general statements of principle. A good deal will naturally emerge as to the actual decisions in the cases themselves, but this will be incidental. Frequently, the decision or opinion of a judicial tribunal has no interest except in relation to the particular facts of the case. What is of *general* interest is the underlying principle: the immediate decision or opinion itself may turn simply on how that principle is to be applied to the circumstances of the case, or to the terms of the treaty provision under consideration.

Separate and Dissenting Opinions. Although the primary object of this study is to present the views of the Court itself, a good deal of prominence is given to the separate or dissenting opinions of individual Judges. These play a valuable part in the functioning of the Court, and to ignore them would be to give but an incomplete portrayal of its work as a whole, as well as to disregard material of primary importance from the standpoint of the present study; for although dissenting Judges differ from the Court as the actual conclusion, they may well, in the course of so doing, make general statements or explanations of principle which are in themselves not in any way inconsistent with the views of the Court, but merely differently applied to the facts. Again, a Judge who delivers a separate but not dissenting opinion, agrees with the conclusion of the Court, but for different reasons, or prefers to give his own reasoning. His views clearly form a valuable supplement to those of the Court. Finally, even where the views of an individual Judge are definitely contrary to those of the Court, on matters of principle, it may be desirable to quote them, because it is often the case, particularly with difficult or controversial questions, that a decision can only properly be appreciated in the light of a contrary view. However, since the object of the present study is purely expository and not evaluatory, still less critical, such views are quoted and discussed only for that purpose.

(g) *Second Reading and Final Vote*

At the second reading the Court reads and discusses the drafting committee's new version, altered and amended to take account of the decisions

¹⁷ *This Year Book*, 27(1950), p. 1. See also Rosenne, *American Journal of International Law*, 81 (1987), p. 681.

made by the Court in the first reading. The President calls for comments as the draft is perused, this time page by page. This time there is normally no reading out loud of the text in the two languages (most of the text will now be familiar to all judges), but any largely new paragraphs may well be read out loud for that reason; and any judge may of course ask for a reading. A somewhat accelerated procedure is the more possible because this second-reading draft, by graphic signs in the margin, readily indicates which passages are newly drafted, and the places where there have been deletions, or where there have been changes of order.

The final vote is taken either at the end of the second reading meeting or after a suitable interval. Voting is 'yes' or 'no' to each question, and is again taken in inverse order of seniority. Where there are separated issues, the votes are taken separately on each issue. The issues, where they are separable and it has been decided to separate them, will be set out at the end of the *dispositif* in the final draft just read. But 'any judge may request a separate vote on any such issue', and there is provision for proper discussion and, where need be, reflection on this matter, before it is decided by the Court.¹⁸ The names of the judges voting 'yes' or 'no' are listed in the report, after each question or issue.

Where there are several issues—in the case of *Nicaragua v. United States of America*¹⁹ there were no less than sixteen—it may be a nice question whether a separate opinion should properly be labelled a dissent or not. The label, though no doubt like most matters ultimately one for the Court, is normally left to the judge himself to decide. It is not only a question of the heading of the opinion and the running captions at the head of the pages of it; the opinions labelled simply separate opinions (*opinion individuelle*)

¹⁸ Article 8 (ii) (a). The entire article is as below. Note the special rules where there are questions of competence or admissibility.

'(i) At or after a suitable interval following upon the termination of the second reading, the President calls upon the judges to give their final vote on the decision or conclusion concerned in inverse order of seniority, and in the manner provided for by paragraph (v) of this Article.

(ii) Where the decision deals with issues that are separable, the Court shall in principle, and unless the exigencies of the particular case require a different course, proceed on the following basis, namely that:

(a) any judge may request a separate vote on any such issue;

(b) wherever the question before the Court is whether the Court is competent or the claim admissible, any separate vote on particular issues of competence or admissibility shall (unless such vote has shown some preliminary objection to be well-founded under the Statute and the Rules of Court) be followed by a vote on the question of whether the Court may proceed to entertain the merits of the case or, if that stage has already been reached, on the global question of whether, finally, the Court is competent or the claim admissible.

(iii) In any case coming under paragraph (ii) of this Article, or in any other case in which a judge so requests, the final vote shall take place only after a discussion on the need for separate voting, and whenever possible after a suitable interval following upon such discussion.

(iv) Any question whether separate votes as envisaged in paragraph (ii) of this Article should be recorded in the decision shall be decided by the Court.

(v) Every judge, when called upon by the President to record his final vote in any phase of the proceedings, or to vote upon any question relative to the putting to the vote of the decision or conclusion concerned, shall do so only by means of an affirmative or negative.'

¹⁹ *ICJ Reports*, 1986, p. 14.

are, in the printed *Reports*, printed before the opinions labelled dissents (*opinion dissidente*). Moreover, it has to be borne in mind that the media do not generally seem to recognize the possibility of dissenting on some issues and not on others, and dissenters will run the risk of being described in the media in a way suggesting total dissent.

Finally comes the reading of the judgment in public session, a curious remnant of the days before duplicators were invented, but which courts everywhere feel, probably rightly, must be maintained. A long judgment, however, is read only in a somewhat shortened version, and the separate opinions and dissents, though mentioned, are not read or summarized. All the separate opinions are, however, in the copies of the Court's decision distributed to the parties at the reading out. The press releases, distributed at the time of the reading, do now contain a summary version (usually prepared by the concerned judges themselves) of all separate opinions, including dissents.

III. CONCLUSIONS

This article, it should be emphasized, makes no attempt at a systematic commentary on the ten articles of the current Resolution concerning the Internal Judicial Practice of the Court.²⁰ It is concerned only with one theme concerning that practice: the significance and importance, in the present delicate and dangerous world situation, of this elaborate and necessarily time-consuming practice, which is designed to ensure, in accordance with the letter and spirit of Article 9 of the Statute, and as far as may be, the fullest participation of all judges in the decisions of the Court and its statement of the law. It seems not to be appreciated as generally as it ought to be that even dissenting judges will have assisted actively in the work of drafting the judgment or opinion, right up to and including the final stages; and that probably the whole Court, and certainly the drafting committee itself, will have taken careful note of and commented on separate opinions including dissents. It is important that these facts about the Court should be more widely appreciated because it is this practice which lends to the Court's pronouncements a unique oecumenical authority, in a world where a developing, general international law is a most important—possibly *the* most important—single vehicle of common action and understanding, and where virtually any determination of a contentious point of international law must have a very considerable political as well as legal significance.

This voluntary code of judicial practice is one which allows of a certain flexibility, and it is possible sometimes to cut corners when there is an

²⁰ For a short but perceptive comment see Rosenne, *Procedure in the International Court* (1983), pp. 230–3.

urgent need for quick decision and pronouncement.²¹ But for major cases involving the interpretation and development of international law as a universal, integrated system, the traditional practice—traditional but modified from time to time in the light of experience—offers the possibility even in a much divided world of an international court speaking with the authority of a world court indeed. It is perhaps regrettable that this inherent authority of the Court's pronouncements is not more widely known. This article is one modest attempt to begin to remedy that deficiency.

²¹ In the case of *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (ICJ Reports, 1988, p. 12), where the General Assembly's request for an advisory opinion mentioned 'the constraints of time', the Secretary-General's letter communicating the request was received by facsimile on 4 March and by post on 7 March; the opinion was delivered on 26 April 1988.

STATE CONTRACTS WITH ALIENS: CONTEMPORARY DEVELOPMENTS ON COMPENSATION FOR TERMINATION OR BREACH*

By DEREK WILLIAM BOWETT¹

I. INTRODUCTION

THE current decisions of the US/Iranian Claims Tribunal, together with a series of other arbitral awards, offer a quite unusual opportunity to review the present state of the law regarding the State's obligation to compensate an alien for a fundamental interference with his contractual rights.

Whether the taking is an overt act of expropriation (or 'nationalization') or, as is commonly the case, an alleged breach of a contract with an alien,² the alien claimant is usually at pains to show that the taking is unlawful. As will be suggested later, the advantage in showing that the taking is unlawful lies in the fact that the remedies for an unlawful act are more beneficial to the claimant than are the remedies for a lawful taking. However, since the legality or illegality of the breach of contract or other taking of property will be determined by the law governing the contract (the 'proper law')—at least in the first instance³—a great deal of legal argument is usually devoted to showing that the proper law is not the law of the State party. The reason for this is obvious. The State party, since it can modify its own law, has the power to ensure that its actions *vis-à-vis* the contract are lawful under its own law. Therefore the alien claimant will seek to show that the proper law is *not* the law of the State party but rather some other law which lies outside that State's control. Therefore, a preliminary question will usually arise of determining the proper law of the contract.

* © Professor D.W. Bowett, 1988.

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² The *US Restatement (Third Restatement, volume 2, 1987)*, s. 712 treats a repudiation or breach of contract as akin to a taking of property (a) where the breach is (i) discriminatory; or (ii) motivated by other non-commercial reasons and compensatory damages are not paid; or (b) where the foreign national is not given an adequate forum to determine his claim of breach or is not compensated for any breach determined to have occurred.

There is little evidence of any real challenge to this assimilation of contractual breach with a 'taking' of property. On the contrary, tribunals seem to accept it: see the cases cited below, pp. 67–9

³ Legality or illegality under the proper law can never be the final determinant. For in relation to the taking of the property of an alien, such taking must satisfy not only the proper law but also international law. Thus even a taking lawful by reference to the proper law (e.g. justified by legislation) could still be unlawful under international law if shown to be discriminatory, or devoid of a genuine public purpose, or lacking in 'just' or 'appropriate' compensation as judged by international standards.

II. THE GOVERNING OR 'PROPER LAW' OF THE CONTRACT

There are only two possibilities: either there is no express choice of law, or there is such a choice.

(a) *No Express Choice of Law*

In this situation there are three different theories commonly used to exclude the application of the law of the contracting State.

1. *The 'vacuum' theory*

This is the theory⁴ that a contract is, in effect, its own proper law, in that it can provide the totality of law needed to regulate the relationships between the parties, without the need to have recourse to any legal system. It is, in short, the theory that a contract can be applied in a legal vacuum.

The theory encounters difficulties which are both theoretical and practical, and it can be criticized on both grounds. At the theoretical level it can be said that, for a contract to be binding, there must be some rule of law extraneous to the contract itself to dictate this result. At the practical level it can be said that no contract could possibly contain, as express clauses, all the complex body of law necessary to deal with eventualities such as mistake, misrepresentation, breach, frustration and the like. The need for a proper law is precisely the need to have recourse to the detailed body of rules which an established legal system provides to cover such eventualities. And there is the further consideration that, if one excludes all legal systems as governing law, one also excludes all concepts of public policy. One is left with a contract attached to no legal system and thus totally free of all restraints of public policy.⁵

Not surprisingly, therefore, courts have tended to reject the vacuum theory. This rejection was expressed by Professor Sauser-Hall in the award in *Saudi Arabia v. Arabian American Oil Co. (Aramco)*⁶ in the following terms:

It is obvious that no contract can exist *in vacuo*, i.e. without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the Parties. It is necessarily related to some positive law which gives legal effects to the reciprocal and concordant manifestations of intent made by the parties. The contract cannot even be conceived without a system of law under which it is

⁴ See McNair, 'The General Principles of Law Recognized by Civilized Nations', this *Year Book*, 33 (1957), p. 1 at p. 9; Verdross, 'Die Sicherung von Ausländischen Privatrecht aus Abkommen zur Wirtschaftlichen Entwicklung Schiedsklausen', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 18 (1957), p. 635.

⁵ It cannot be said that this void would be filled by a Court applying the public policy of the *lex fori*. For where litigation ensues before a 'delocalized' arbitral tribunal there is no *lex fori* in the accepted sense. And even before a national tribunal the application of the public policy rules of the forum is the application of a governing law and therefore a rejection of the 'vacuum' theory.

⁶ 27 ILR 117 (Arbitral Tribunal, 1958).

created. Human will can only create a contractual relationship if the applicable system of law has first recognized its power to do so.⁷

2. The 'internationalization' theory

A different theory is that some contracts are by their very nature 'internationalized' and therefore subject to international law either instead of, or in addition to, the law of the contracting State. This was the view adopted by Dupuy, as sole arbitrator in *Texaco v. Libyan Arab Republic (Topco)*,⁸ and it has many adherents.

The theory also has many critics.⁹ Not the least of its difficulties is that no convincing definition of the category of contracts so 'internationalized' has ever been given. Moreover, the fact that Western, developed States concluding the same type of so-called 'development' contracts involving investment by foreign investors do not accept the theory of 'internationalization' inevitably raises the question why such contracts are only 'internationalized' if concluded by developing States.¹⁰ As Jaenicke has said:

... no cogent reasons can be found why the dimension of the investment should be sufficient justification for treating such agreements differently from other transnational contracts, and there are no precedents for such a privileged treatment except in those cases where the parties have manifested their intention to remove the investment agreement from the local jurisdiction by providing for the submission of their disputes to international arbitration.¹¹

Thus, there are arbitral decisions in which the theory has been either rejected¹² or ignored,¹³ and it has to be said that the theory seems an essentially self-serving theory designed to support a very partisan, capitalist approach to contractual disputes. For it is important to grasp the essential aim of this theory. Its aim is twofold: first, to remove the contract from the

⁷ Ibid. at 165.

⁸ 53 ILR 389 (1977), *International Legal Materials*, 17 (1978) p. 1 (International Arbitral Tribunal, 1978).

⁹ For criticism of the theory see Rigaux, *Droit public et droit privé dans les relations internationales* (1977), p. 435; Wengler, 'Les Accords entre état et entreprises étrangères, sont-ils des traités de droit international?', *Revue générale de droit international public*, 76 (1972), p. 313; Verhoeven, 'Contrats entre états et ressortissants d'autres états', *Le Contrat économique international: stabilité et évolution* (1975), pp. 115, 141.

¹⁰ Fatouros, 'International Law and the Internationalized Contract', *American Journal of International Law*, 74 (1980), p. 136.

¹¹ Jaenicke, 'Consequences of a Breach of an Investment Agreement governed by International Law, by General Principles of Law, or by Domestic Law of the Host State', in Dicke (ed.), *Foreign Investment in the Present and a New International Economic Order* (1987), pp. 177-93, at p. 180.

¹² See Paulsson, 'The ICSID *Klöckner v. Cameroon* Award: The Duties of Partners in North-South Economic Development Agreements', *Journal of International Arbitration*, 1 (1984), p. 145 at p. 157: 'We do not intend to apply new or exceptional legal principles to turn-key operations only because they concern projects affecting the economic and social development of a given country.' This is a salutary rejection of the idea that such contracts form a special category.

¹³ Significantly, in *Kuwait v. American Independent Oil Co. (Aminoil)*, *International Legal Materials*, 21 (1982), p. 976 (Arbitral Tribunal, 1982), the Tribunal placed no reliance on the controversial theory of 'internationalization', but relied on the choice-of-law clauses in the agreement and the evidence of Kuwait law.

control of the law of the contracting State (i.e., by substituting international law as the proper law) and, second, to deprive the State of the right to change its law and thereby affect the contract (i.e., by invoking the international law maxim *pacta sunt servanda*).

It remains arguable that where the agreement contains an arbitration clause, removing the agreement from the jurisdiction of the local courts, this can be evidence of an implied choice of international law. Certainly Dupuy, in the *Topco* case, adopted this view. However, *prima facie* an arbitration clause affects jurisdiction, not choice of law, and there is no inherent reason why arbitrators should not apply the local law. Such an inference as to the displacement of the local law can only properly be drawn in those cases where the arbitration tribunal must be assumed to be applying international law. Thus, choice of arbitration under the World Bank Convention on the Settlement of Disputes of 1965¹⁴ would involve the application of Article 42(1) of the Convention which directs an ICSID tribunal, in the absence of an express choice of the law by the parties, to apply the law of the host State (including its rules on the conflict of laws), and such rules of international law as may be applicable. The effect of this is to allow the application of the law of the host State, but only to the extent that it is consistent with international law.¹⁵

3. *The theory of a lex mercatoria*

This is the theory that, unless excluded by an express choice of law, the contract is governed by the *lex mercatoria*. The *lex mercatoria* has varying connotations, but is sometimes used to embrace general principles (although supplemented by trade usages and customs). It has both proponents¹⁶ and opponents,¹⁷ but its defects are principally that, in practice, it offers few predictable rules and, instead, confers wide discretion on an arbitrator. Moreover any approach based on *lex mercatoria* tends to be biased in favour of the private, commercial interests and to minimize the role of State interests.

4. *The preferable solution*

The preferable solution is achieved by applying normal principles of the conflict of laws, that is to say by determining, objectively, the law with

¹⁴ *United Nations Treaty Series*, vol. 575, p. 159.

¹⁵ Decision of 3 May 1985 (*Klöckner v. Cameroon*), *Foreign Investment Law Journal*, 1 (1986), p. 89; Decision of 16 May 1986 (*Amco Asia Corp. v. Indonesia*), *International Legal Materials*, 25 (1986), p. 1441 at pp. 1445–6. This interpretation of Article 42 has recently been affirmed again by the Arbitral Tribunal in its Award of 31 March 1986 in *Liberian Eastern Timber Co. (Letco) v. Liberia*, *ibid.* 26 (1987), p. 647 at p. 658.

¹⁶ See Goldman, 'La *Lex mercatoria* dans les contrats et l'arbitrage internationale', *Clunet*, 106 (1979), pp. 471 ff.; and for more dispassionate surveys Kaufman, 'The Law of International Commercial Transactions (*Lex Mercatoria*)', *Harvard International Law Journal*, 19 (1978), pp. 221–9; Lando, 'The *Lex Mercatoria* in International Commercial Arbitration', *International and Comparative Law Quarterly*, 34 (1985), pp. 747–51; Mustill, 'The New *Lex Mercatoria*; The First Twenty-five years', in *Liber Amicorum for Lord Wilberforce* (eds. Bos and Brownlie, 1987), pp. 149–84.

¹⁷ See Lagarde, 'Approche critique de la *lex mercatoria*', in *Mélanges Goldman* (1982), pp. 125 ff.

which the contract has the closest connection. Presumptively, this is the law of the contracting State party,¹⁸ and, although this is rebuttable, it will normally be a difficult presumption to rebut if the contract is to be performed in that State and if, by the law of the State itself, the State is mandatorily required to contract by reference to that law.

Certainly there have been some few cases in which the State's law has been inadequate to deal with the specific problem posed, and so arbitral tribunals have understandably had to supplement the State's law by reference to 'general principles of law'.¹⁹ But the use of general principles as a supplementary source of law, to avoid a *non-liquet*, is very different from the disregard of the contracting State's law as the basic, proper law. Moreover, as the legal systems of developing States become more sophisticated, the need for supplementation by 'general principles' will decrease.

(b) *Situations of an Express Choice of Law*

All systems of law allow freedom of choice (autonomy of will) subject to any restraints of public policy, and such choice should in principle be respected.²⁰ If, therefore, the parties have expressly chosen to submit their contract in some degree to either 'general principles of law' or international law, the question is not so much whether the choice is permissible but rather what its implications will be. A choice of 'general principles' at least allows an arbitrator to refer to the considerable body of contract law to be found in various legal systems. Certainly it confers on the arbitrator wide discretion, for his selection and identification of the relevant general

¹⁸ *Serbian and Brazilian Loans* cases, Judgment No. 14 and Judgment No. 15 (1929), *PCIJ*, Series A, No. 20, at p. 42, No. 21, at p. 121; *Aramco*, 27 ILR at 167 (Sauser-Hall as arbitrator).

¹⁹ See, e.g., *Société Riale v. Ethiopia*, *Recueil des décisions des Tribunaux Arbitraux Mixtes*, 8 (1929), p. 742; *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 ILR 144 (Arbitral Tribunal, 1951); *Aramco*, 27 ILR at 168-70, 171.

²⁰ But see the extraordinary decision by an International Chamber of Commerce Court of Arbitration in *SPP (Middle East) Ltd. v. Egypt*, *International Legal Materials*, 22 (1983), p. 752, which, in the writer's view, is wholly fallacious. In that case the Court accepted that Egyptian law was the proper law of the agreement, that is to say the 'relevant domestic law'. But the Court went on to find that international law could be deemed to be part of Egyptian law and therefore concluded: '[W]e find that reference to Egyptian law must be construed so as to include such principles of international law as may be applicable and that national laws of Egypt can be relied upon only in as much as they do not contravene said principles': *ibid.* at p. 771.

This conclusion must be wrong, because virtually all municipal law systems allow for the incorporation or application of relevant rules of international law. The court's conclusion that principles of international law override internal legislation in the event of inconsistency is contrary to the practice in most States. Moreover, it means, in effect, that an express choice of a given system of municipal law to govern a contract can never, as such, be an exclusive choice. For whether that chosen law be English, French, Egyptian or Iranian, to the extent that international law forms part of those legal systems, it would be open to any court to bypass the chosen proper law and apply the principles of other municipal systems as 'general principles of law' forming part of international law. This would be entirely contrary to the expectations of the parties, a point which has been so manifestly overlooked by this very unfortunate decision. In short, whenever there is a contractual choice of a specific, municipal legal system as the proper law, the choice is of that legal system *per se*. There is no *renvoi* to international law, and thereby to other municipal systems generally, via the concept of 'general principles of law' as a part of international law.

principles is subjective. But at least there is no shortage of principles of contract law. However, reference to international law is quite another matter, for at present there are no international law rules of contract law. This is not to doubt the capacity of international law to develop such rules,²¹ but simply to state that at present it is difficult to identify any such body of rules. What, therefore, can a reference to international law mean?

Usually the choice of international law is not in substitution for the law of the contracting State party, but as a safeguard against any unreasonable application of that law. A typical example is Clause 28 of the Libyan concession which was at issue in the *Topco* case.²² The clause provided as follows:

This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.²³

The intention seems tolerably clear. It is to control the application of Libyan law to the contract by allowing the application of Libyan law only where its principles coincide with international law, and, if there is no coincidence, to refer instead to 'general principles'.

But how can one expect coincidence between the Libyan law of contract and international law when, in fact, international law contains no rules about contracts? The answer given to this question by the Western investor is, in effect, that international law, while containing no rules about private law contracts, does contain rules about treaties which can be used by analogy. And the fundamental rule of treaty law is *pacta sunt servanda* (treaties are binding) so that, applying that rule, the State party cannot rely on Libyan law so as to assert a right to vary or terminate the contract.

In fact, however, the claimed analogy is no analogy at all. The investment contract between a State and a private entity not only is not a treaty but cannot even be regarded as analogous to a treaty. For there is a world of difference between an agreement under international law between two equal, sovereign States and a contract between a State and a private party governed *prima facie* by the State's own law. Obviously, with a treaty one State cannot use its own municipal law to vary its treaty obligations towards

²¹ There is no intrinsic reason why international law should not develop a body of rules regulating the State's power to contract with aliens. After all, there is a body of rules, in the law of State responsibility, regulating a State's conduct towards aliens. And international law has already developed the doctrine of restrictive sovereign immunity, designed to preclude a State from invoking immunity in cases involving its commercial relations with aliens.

²² 53 ILR at 389; *International Legal Materials*, 17 (1978), at p. 1.

²³ 53 ILR at 404; *International Legal Materials*, 17 (1978), at p. 11. Of course, even under such a clause a breach of international law would remain a *contractual* breach. It would not, *per se*, give rise to international legal responsibility. See Abi-Saab, 'The International Law of Multinational Corporations: a Critique of American Legal Doctrines', *Annales d'études internationales* (1971), pp. 97-122 at p. 106.

another State. But it is by no means obvious why, with a private law contract, the State party should not assert that right. Indeed, as we shall see, States commonly do assert such a right.

If reference to general principles is to be made then recourse to such maxims as 'contracts are binding' is scarcely adequate. It is at such a level of generality as to be misleading (since all legal systems recognize exceptions to this rule, when termination is justified) and even erroneous, in that, so expressed, the maxim fails to take account of the fundamental distinction between private and public (or State) contracts.

The relevance of this distinction has recently been recognized in the award in *Amco Asia v. Indonesia* in which the Tribunal said:

However, it [the relationship established between Amco Asia and Indonesia] is not *identical* to a private law contract, due to the fact that the State is entitled to withdraw the approval it granted *for reasons which could not be invoked by a private contracting entity, and/or to decide and implement the withdrawal by utilising procedures which are different from those which can and have to be utilised by a private entity*.²⁴

The Tribunal went on to refer expressly to the State's right to nationalize, now recognized in national legal systems as well as in international law, as typical of the exceptional powers of a State party to terminate contracts.

The consequence of this distinction is that, whereas in a contract between private parties the grounds for termination are limited, in a public contract the State party has very wide sovereign, or prerogative, powers to vary or terminate in the public interest. The *International Encyclopedia of Comparative Law*, having reviewed the legal systems of France, West Germany, Italy, the UK and the USA, puts the matter thus:

The most radical of special prerogatives enjoyed by the administration is the right to terminate the contract unilaterally, when the public interest so requires. This drastic power is a widespread feature of national systems of procurement, and is evidently considered necessary in order to maintain the freedom of action of public authorities.²⁵

In the law of the US the law in the matter of termination of public contracts is well-developed,²⁶ although it has developed against the background of a constitutional protection of property and contractual rights.²⁷ It would seem to recognize four different propositions. The first is that the

²⁴ ICSID Award of 21 November 1984, *International Legal Materials*, 24 (1985), p. 1022 at p. 1029 (original emphasis). On 16 May 1986 this award was annulled by an *ad hoc* committee, but the annulment was based upon what was perceived as an erroneous valuation of Amco's investment, and not on the point adverted to above: see *ibid.* 25 (1986), p. 1439.

²⁵ *International Encyclopedia of Comparative Law*, vol 2, *Contracts in General*, ch. 4, 'Public Contracts', p. 40.

²⁶ McBride and Wachtel, *Government Contracts* (1976), ch. 30, 'Termination for Convenience of the Government'.

²⁷ Article I, s. 10, forbids any State to 'pass any . . . law impairing the obligation of contracts'. It was Marshall CJ's contribution to extend this to cover public contracts: see Pritchett, *The American Constitution* (1977), ch. 28, pp. 512-13.

Government has an inherent right to cancel a public contract in the public good; but that such a unilateral termination is a breach of contract entitling the private contractor to common law (or general) damages.²⁸

The second proposition is that where the Government retains a contractual right to terminate, by an express term in the contract, then termination is not a breach of contract and, though there is a duty to compensate, the duty is more restricted: specifically, it does not include a duty to compensate for anticipatory profits. In practice, the US Government commonly inserts a standard-form 'termination for convenience' clause in its contracts. Such clauses are found in the Defence Acquisition Regulations (DAR), the Armed Services Procurement Regulations (ASPR), and the Federal Procurement Regulations (FPR): to cite the last of these:

(a) General. Profits shall be allowed on preparations made and work done by the contractor for the terminated portion of the contract . . . Anticipatory profits and consequential damages shall not be allowed.²⁹

The effect of such a clause is to distinguish sharply the private contractor's remedies in damages from those he would have in an ordinary commercial contract between private parties. The effect has been described as follows:

The general rule is that the Contractor is entitled to a reasonable profit on the preparations made and work done with respect to the terminated portion of the contract . . . Anticipatory profits are not recoverable. Unlike ordinary commercial contract law the entire profit which would have been realised by the contractor had the contract been fully completed (i.e. 'anticipated profit') may not be included in the termination of convenience settlement.³⁰

Even if such a 'termination for convenience' clause has been inadvertently omitted, US courts will imply it.³¹

Of course it may be said that there would be an analogy only where the State inserted a similar clause in a contract with a foreign private entity, and this is not usually the case. This may be true, but evidence of US practice does give a State justification for insisting on such a clause in contracting with foreign corporations (for if a US corporation contracts with its own Government on this basis, why should it not do so with a foreign

²⁸ *US v. Corliss Steam Engine Co.*, 91 US 321 (1875). McBride and Wachtel summarize the position as follows: 'The right is inherent, but there is a concomitant duty to compensate . . . In the absence of both a statute and a contract clause delineating the rights of the parties, a termination for the convenience of the Government exercised unilaterally, is a breach of contract, and in that event the contractor is entitled to common law damages . . .' (op. cit. above (n. 26), s. 30.20). There is a distinct awkwardness in characterizing the exercise of an inherent right as a 'breach of contract', but that seems to be the position.

²⁹ See Perlmann and Goodrich, 'Termination for Convenience Settlements: the Government's Limited Payment for Cancellation of Contracts', *Public Contract Law Journal*, 1 (1978), p. 1 at p. 28.

³⁰ Andrews and Peacock, 'Termination: an Outline of the Parties' Rights and Remedies', *Public Contract Law Journal*, 2 (1980), p. 269. For recent developments, controlling the Government's pleas of good faith, see 'Limiting the Government's Ability to Terminate for its Convenience following *Tornello*': Note in *George Washington Law Review*, 1984, p. 892.

³¹ *Christian v. US*, 312 F 2d 418 (1963).

Government?). Additionally it casts doubts on the general plea of the sanctity of contracts, for it demonstrates that US corporations contract with their own Government on a relatively insecure basis, and have no expectation of recovering loss of future profits if the Government terminates.

The third proposition is more obviously analogous to the typical expropriation situation, in which the expropriation is effected by legislative act. The proposition is that where the US Government terminates a contract under powers conferred by statute, the statutory right to terminate impliedly becomes a term of the contract.³² Moreover, it is an implied condition of every contract that the Government can, by future legislation, modify or terminate public contracts in the best interests of the US.³³ The position has been described thus:

. . . the cardinal point to be borne in mind is that whether the contract requisitioned or cancelled be one with the government or one between private individuals, the person whose property rights are taken or destroyed is entitled to receive just compensation, not damages as for a breach. A sufficient ground for the distinction lies in the fact that in the one case the requisition or cancellation is a lawful act under the power of eminent domain, while in the other the act constituting the breach is unlawful.³⁴

Again, the consequence of this distinction between an unlawful breach and a lawful, statute-authorized termination is that in the latter case no recovery of future profits is allowed.

Since a termination made pursuant to an authorising statute does not constitute a Government breach of contract, an aggrieved contractor in this instance cannot recover common law damages. It follows from this . . . that anticipatory profits cannot be recovered by the contractor as part of a termination claim pursuant to a termination authorised by law, since anticipatory profits are the equivalent of general damages.³⁵

The fourth proposition is that the Government cannot, by a term in the contract (a 'stabilization clause'), deny itself the right to vary or terminate the contract by legislative act in the future. As the Supreme Court has said:

The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed essential to the life of the State. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will.³⁶

The position in the law of England is very similar. Where the Crown acts in an executive capacity to vary or terminate a contract, its action is deemed to

³² *College Point Boat Corp. v. US*, 267 US 12 (1925).

³³ *Delaval Steam Turbine Co. v. US*, 284 US 61, 70 (1931).

³⁴ McBride and Wachtel, op. cit. above (n. 26), s. 30.40, 'Statutory Right'.

³⁵ Ibid., citing *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.*, 95 F Supp. 570 (DCSD Cal., 1951).

³⁶ *Georgia v. City of Chatanooga*, 264 US 472, 480 (1924). See generally McAllister, 'US Constitutional Law and its relation to a Contract between a State and a Foreign National', *Rights and Duties of Private Investors Abroad* (1965), p. 213 at pp. 249-51.

be lawful, and no breach of contract. To cite again the *International Encyclopedia of Comparative Law*:

... a public contract is construed as being impliedly subject to the exercise by the governmental authority of its general powers and discretion in the public interest. Action taken by the Crown or other public authority in the proper performance of its functions and for a 'general executive purpose' will accordingly not constitute a breach of contract, even if it impedes or frustrates performance by the contractor.³⁷

Moreover, where a contract is governed by English law (and it seems all contracts made by the Government of the UK, to be performed within the UK, will be so governed), such a contract is always subject to future legislation. Neither a local authority³⁸ nor the central Government may by a contractual term (a 'stabilization clause') exclude the operation of a future statute. As was said within recent years in the Court of Appeal:

... a government cannot fetter its duty to act for the public good. It cannot bind itself—by an implication in the contract—not to perform its public duties.³⁹

Indeed, in English law not only is 'stabilization' impossible against future legislation but, because of the doctrine of Parliamentary supremacy, no English court could challenge the assertion that Parliament was acting in the public good. The relative insecurity of contracts with the British Government has been demonstrated in the recent past by the Government's readiness to alter the terms of its contracts with foreign corporations over the development of North Sea oil.⁴⁰

It is self-evident that the whole purpose behind the moves to subject a contract to general principles of law, or international law, and to 'stabilize'

³⁷ Op. cit. above (n.25), ch. 4, 'Public Contracts', pp. 38–9.

³⁸ *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623 (HL).

³⁹ *Czarnikow v. Rolimpex*, [1977] 3 WLR 686 per Lord Denning MR, following *The Amphitrite*, [1921] 3 KB 500: the Court of Appeal's decision was affirmed by the House of Lords in [1978] 3 WLR 274. The same point is well made by Mann, in challenging the UK Government's assertion to the contrary in the *Anglo-Iranian Oil Company* case: see Mann, 'State Contracts and State Responsibility', *American Journal of International Law*, 54 (1960), pp. 587–8.

⁴⁰ The idea that the assertion of a governmental power to vary contracts with foreigners is essentially a policy favoured by developing States is quite untenable, for Western European States now do so, particularly in the domain of petroleum concessions. As recently stated by two English authors, 'It will have become clear to oil companies that the UK and Norwegian Governments are no more willing than their OPEC counterparts to stick rigidly to contracts that they deem unreasonably disadvantageous and that there is no absolute constitutional protection in either country for the principle *pacta sunt servanda*': Daintith and Gault, 'Pacta Sunt Servanda and the Licensing and Taxation of North Sea Oil Production', *Cambrian Law Review*, 8 (1977), pp. 28, 42. The point can be illustrated by the UK legislation of 1975. The effect of that legislation has been described in the following terms:

'The Petroleum and Submarine Pipe Lines Act of 1975 made substantial changes in the terms of all existing production licenses, introducing, *without compensation*, new obligations, particularly in regard to development programmes and depletion, and much stricter limitations on assignments. In facing predictable Parliamentary criticism that the Act displayed a disrespect for the United Kingdom's contractual obligations and for the rule of law, and even constituted an illegal expropriation of license rights in international law, Ministers consistently professed to see no difference between what

the contract is to ensure that the State's termination of the contract can be characterized as unlawful.

But if the breach is then treated as an unlawful taking, as an 'expropriation', it is difficult to see what the advantage is. For international law has its own conditions governing the legality of expropriation (public purpose, non-discrimination, compensation) and it is not suggested that these are excluded or made irrelevant by reason of the contract being governed by the contracting State's own law. If those international law rules are satisfied, the legality or illegality under the proper law of the contract is irrelevant. The argument⁴¹ therefore seems to depend on treating the breach as *per se* unlawful, in effect treating this as an independent international wrong, or alternatively making legality by reference to the proper law an *additional* condition of a lawful expropriation.

Another explanation would be that, if the dispute were taken out of the context of expropriation, and simply dealt with as a case of contractual breach—as it might be in an international commercial arbitration—the finding of breach would lead to damages for the breach, resulting in a higher award than might be expected by way of compensation for a lawful expropriation.

III. THE CONSEQUENCES OF THE DISTINCTION BETWEEN A LAWFUL AND AN UNLAWFUL TAKING: ITS EFFECT ON REMEDIES

There would seem to be little value in making this distinction between a lawful and an unlawful taking unless consequences flowed from it: and it would be extraordinary if the distinction was of no consequence. In fact, practice suggests that the distinction does affect the remedies available to the complainant.

(a) *Restitution* (Restitutio in Integrum)

The dictum of the Permanent Court in the *Chorzów Factory* case suggested that, as a consequence of the *illegality* of the act, restitution would

the Act was doing and the alteration of regulatory or fiscal measures with the effect of making contracts more onerous . . .':

Daintith and Willoughby, *A Manual of United Kingdom Oil and Gas Law* (1977), p. 30 (emphasis added).

The UK Government formally rejected any suggestion of impropriety or even a duty to compensate. In addressing Parliament, Anthony Wedgwood Benn the UK's Secretary of State for Energy, said: 'the change in the legal framework that is available to Governments and is regularly used by a whole host of environmental, health, tax and other measures which are taken by any responsible government, does not include the provision to compensate as a result': *Hansard*, HC Debs. (5th series), vol. 5 col. 1167 (1975) (Report of Standing Committee D on Petroleum and Submarine Pipelines Bill).

⁴¹ For a recent and detailed exposition of this argument see Schwebel, 'On whether the breach by a State of a Contract with an Alien is a Breach of International Law', in *Le Droit international à l'heure de sa codification, Essays in Honour of Roberto Ago* (1987), vol. 3, pp. 401–13.

be the primary remedy, and compensation would serve as a secondary remedy if restitution were not possible.⁴² In the *Texaco v. Libya* case, Dupuy followed this argument and equated specific performance with restitution.⁴³ Yet this course was rejected by Lagergren as arbitrator in *BP v. Libya*,⁴⁴ and by Mahmassani as arbitrator in the *Liamco* case.⁴⁵ As is well known, specific performance did not in fact take place in *Texaco v. Libya*, and compensation was eventually agreed between the parties. Similar hesitations about the remedy of restitution can be seen in the award in *Amco Asia Corp v. Indonesia*. The Tribunal was concerned with the claim that the Indonesian Government had unlawfully revoked an investment licence, granted to the alien corporation. It said:

It is obvious that this Tribunal cannot substitute itself for the Indonesian Government, in order to cancel the revocation and restore the licence: such actions are not even claimed, and it is more than doubtful that this kind of *restitutio in integrum* could be ordered against a sovereign State.⁴⁶

There may well be a role for restitution of the actual property taken in cases where there has been an unlawful detention of a ship, aircraft or other chattel; or where there has been an unlawful occupation of territory.⁴⁷ Yet in situations where the taking is of the business of exploitation of natural resources, within a State's territory, or indeed any other commercial enterprise which has to operate within that State's territory, the likelihood of restitution is remote, and specific performance will usually be impractical, so that a claim to compensation will become, realistically, the primary remedy. Similar arguments would tend to relegate the remedy of a declaratory judgment to a secondary role in such cases.⁴⁸

⁴² *PCIJ*, Series A, No. 17, p. 47. See Mann, 'The Consequences of an International Wrong in International and National Law', this *Year Book*, 48 (1976-7), p. 1 at pp. 2-5.

⁴³ (1974), 53 ILR 389 at 497-508. Dupuy relied, in addition, on the *Mavrommatis Jerusalem Concessions Case* (1925), *PCIJ*, Series A, No. 5 at p. 51; the *Temple of Preah Vihear* case, *ICJ Reports*, 1962, p. 6 at pp. 36-37; the judgment of the Central American Court of Justice in *El Salvador v. Nicaragua*, *American Journal of International Law*, 11 (1917), p. 674 at p. 730; the *Martini* case, *ibid.* 25 (1931), p. 554 at p. 585; and the writings of publicists.

⁴⁴ 53 ILR 296.

⁴⁵ 62 ILR 140.

⁴⁶ ICSID Tribunal, award of 20 November 1984: *International Legal Materials*, 24 (1985), p. 1022 at para. 202. See also the *Letco* case, another ICSID award: *ibid.* 26 (1987), at p. 668, where the Tribunal excluded the possibility of specific performance of a concession contract with Liberia, or even the value of an injunction, and so confined itself to money damages. For a thorough review of the cases see Gray, *Judicial Remedies in International Law* (1987), pp. 12-16.

⁴⁷ Thus, Lagergren in *BP v. Libya* declined to make a declaratory order, stating the rights of the parties, on the ground that such an order was akin to specific performance: *loc. cit.* above (n.44) pp. 352-3.

⁴⁸ Schwebel, 'Speculations on Specific Performance of a Contract between a State and a Foreign National', *The Rights and Duties of Private Investors Abroad* (1965), pp. 209-10, suggests the remedy might also be appropriate where the expropriating State cannot pay the damages required, i.e. as an alternative or secondary remedy to damages. Higgins, 'The Taking of Property by the State', *Recueil des cours*, 176 (1982-III), at p. 321 finds little evidence in practice of any real expectation that restitution will be granted.

(b) *Damages or Compensation*

If, in the majority of cases, a pecuniary award is the most practical, it offends against all common sense to suggest that it makes no difference whether the taking is lawful or unlawful and that the financial consequences will be the same in both cases. Being sensitive to this commonsense principle, several US claimants before the US/Iran Claims Tribunal have argued that there is a difference. The difference lies in the fact that, where the taking is unlawful, the Tribunal can set it aside and order *restitutio in integrum* (as in the *Topco* case), or award higher compensation by taking the value of the property on the date of the award if that value is higher than the value at the date of taking. These so-called 'differences' are not persuasive. Restitution is, as we have seen, normally quite impractical. And it is very rare for the value of an undertaking to be higher after an expropriation. In practice, with most of the expropriation claims before the US/Iran Claims Tribunal, the amounts claimed were identical, whether the claim was for breach of contract or expropriation, and in no case did the US claimant ask for different levels of compensation, according to whether the expropriation was held to be lawful or unlawful. Thus, US claimants have faced an unsurmountable obstacle: a difference had to be found.

As the review of State practice in the matter of public contracts above has shown,⁴⁹ this difference is fundamental in private law. An unlawful taking or breach of contract may give rise to general damages, *including loss of anticipatory profits*; but a lawful taking by exercise of prerogative or statutory right will give rise only to just compensation, which does *not* include anticipatory profits, and which is different from the concept of damages.⁵⁰

Thus, it is suggested that the general notion of compensation—whether qualified as 'full', 'just', 'reasonable', 'appropriate' or whatever—is of itself inadequate. What has to be done is to break down the different interests of the claimant (the different heads of claim) instead of dealing with 'compensation' in the abstract. When this is done, usually the claim can be seen to comprise three separate heads.

1. *Assets, whether tangible or physical assets, or 'book' assets such as debts or monies due*

Compensation for the value of such assets is normally accorded, and this seems to be so whether the taking is lawful or unlawful.⁵¹ The argument for compensating for the value of assets taken over, in a lawful taking, is best

⁴⁹ Above, p. 56.

⁵⁰ The difference between compensation and damages has been stressed by the US/Iran Claims Tribunal in *Amoco International Finance Corp. v. Iran*, Award No. 310-56-3, 14 July 1987, para. 194.

⁵¹ See, for example, the *Liamco* case, award of Mahmassani as arbitrator, 12 April 1977: 62 ILR 201: '... there is no difficulty [in concluding] that the indemnity shall include as a minimum the *damnum emergens*, e.g. the value of the nationalized corporeal property, including all assets, installations, and various expenses incurred'. Followed in the case of *Sedco v. Iran*, Award No. ITL 59-129-3 (Chamber Three) of 27 March 1986.

viewed in terms of 'unjust enrichment': for to expropriate without payment for such assets would be a form of unjust enrichment by the State. *A fortiori*, there must also be compensation for the assets in an unlawful taking.

Obviously, there remains the problem of how best to value the assets. Assets will normally have a 'book value', which may be 'net', or 'updated' or 'depreciated', and, according to the nature of the asset, its value may have increased or decreased with time.⁵² Thus land or buildings may well increase in value; machinery and plant will tend to decrease. 'Replacement cost' may be yet another standard of value, if assets will have to be replaced by the dispossessed owner. Yet these are largely technical problems which accountants or valuers are used to handling, and courts will frequently seek technical advice of this kind in arriving at an appropriate figure. It is not here that the main controversy lies.

2. *Interest on the value of the assets*

Courts will commonly award interest on the value of the assets, over the period between the date of the taking of the property and the date of the award or its payment. The rationale is obvious enough. The owner was, at the date of the taking, deprived of the value of his assets so that, treating the assets as 'capital' which he is no longer able to use to produce income, he is entitled to interest on that capital. For example, the US/Iran Claims Tribunal has normally awarded 'fair' interest, ranging from ten to twelve per cent in the years 1982/3, although in some cases it has awarded a lump sum as interest damages.⁵³

However, it would seem that, logically, an award of interest ought to exclude any award of loss of profits, or even a supplemental 'inflation factor' over the same period of time. This is for the reason that, conceptually, the assets are to be regarded *either* as capital, earning interest (and with the interest being at a rate which market forces will adjust in the light of inflation) *or* as assets in use and notionally earning profits. But not both: for the assets cannot be regarded as invested capital, producing interest, and productive capital, producing profits, at one and the same time.

It is on this score that the award in *Kuwait v. Aminoil*⁵⁴ causes some con-

⁵² In *Kuwait v. Aminoil*, *International Legal Materials*, 21 (1982), p. 976 at pp. 1038–9, the Tribunal regarded net book value as appropriate only in cases of a recent investment, where original cost is close to replacement cost. But differences between the two can be accommodated by up-dating, so perhaps the real factor influencing the Tribunal was that the assets were to belong to Kuwait, free of cost, at the termination of the concession. Yet, for the fixed assets, the Tribunal used 'depreciated replacement value', a term it does not explain further (see p. 1042).

⁵³ See Stewart and Sherman, 'Developments at the Iran—United States Claims Tribunal: 1981–1983', *Virginia Journal of International Law*, 24 (1984), p. 1 at pp. 35–6. In *Starrett Housing Corp. v. Iran*, Award No. 314–24–1 (Chamber One), of 14 August 1987, the Tribunal awarded 8.5 per cent, leading to criticism and dissent on this point by Judge Holtzmann who would have awarded a higher rate, and even compound interest. There is, in fact, little support for the awarding of compound interest. See Whiteman, *Damages in International Law*, vol. 3, pp. 1997–2003. The practice of the Tribunal, refusing compound interest, is stated in *Sylvania Technical Systems v. Iran*, Award No. 180–64–1, 27 June 1985.

⁵⁴ *International Legal Materials*, 21 (1982), p. 976 at p. 1041, para. 176(2).

cern. The Tribunal fixed an interest rate of 7.5 per cent *and* an inflation rate of 10 per cent, which would seem to be compensating for the same factor twice over. Whether the Tribunal awarded loss of profits in addition (thus compensating thrice over) is more controversial, and cannot be stated categorically because of the elusiveness of the relevant sections of the award.⁵⁵

3. *Loss of future profits (lucrum cessans)*

It is here that the fundamental distinction between the lawful and unlawful taking has its most important consequence. For the correct principle is believed to be that loss of future profits, whilst a legitimate head of general damages for an unlawful act,⁵⁶ is not an appropriate head of compensation for a lawful taking. This is certainly the position in US law in relation to the lawful termination of a public contract, whether pursuant to a 'termination for convenience' clause in the contract, or an enabling statute.⁵⁷

It is in some senses remarkable that this distinction, regarded as so fundamental in US law, seems to be ignored in contemporary American statements on international law.⁵⁸ In part this is achieved by simply reiterating the requirement that compensation be 'full', without reference to whether the taking be lawful or unlawful, or, more understandably, by pointing out that in cases where a treaty recognizes the right to expropriate or nationalize (and therefore we can assume the taking to be lawful), nevertheless 'full' compensation is required. Thus, for example, the 1955 US/Iran Treaty of Amity, Article IV (2), provides as follows:

. . . property shall not be taken except for a public purpose, nor shall it be taken without the payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken . . .

⁵⁵ Teson, 'State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration', *Virginia Journal of International Law*, 24 (1984), p. 323 at pp.357-8, believes loss of future earnings was the basis of compensation. Young and Owen, 'Valuation Aspects of the Aminoil Award', in Lillich (ed.) *Valuation of Nationalized Property in International Law*, vol. 4 (1987), pp. 3-30, also state that the award determined compensation on the basis of both *damnum emergens* and *lucrum cessans*, and that it endorsed 'going concern value'. This is not consistent with the express rejection of the DCF method by the Tribunal, nor with the figures (Aminoil's claim for going-concern value was for \$2.5 billion: the Tribunal awarded \$206 million).

⁵⁶ Even here, recovery of loss of future profits would be subject to the requirement that the losses should not be speculative or uncertain. It is on this ground that recovery has frequently been refused by tribunals. See the *De Caro* case, Italy/Venezuela Claims Commission, *Reports of International Arbitral Awards*, vol. 10, p. 642; the *Valentiner* case, Germany/Venezuela Claims Commission, *ibid.*, pp. 403-4; the *Rudloff* case, US/Venezuela Claims Commission, *ibid.*, vol. 9, pp. 258-9. The shorter the period, the less speculative, so that in the *May* case, US/Guatemala, *ibid.*, vol. 15, p. 55 at p. 72, the contract had only six months more to run, and so future profits could be calculated and awarded. Some treaties bar awards for loss of future profits: see, on the Treaty of Berlin, the *Robert Davie Trudgett* case, US/Germany, *ibid.*, vol. 7, p. 6; and the *Vinland* case (1925), Administrative Decision No. VII, *ibid.*, pp. 203-4.

⁵⁷ Above, pp. 56-7.

⁵⁸ See the *US Restatement*, s. 712, Comment (d).

The US/Iranian Claims Tribunal, in *INA Corp. v. Iran*⁵⁹ found that this provision was intended to adopt the customary international law standard of compensation, and not a higher, treaty, standard. Yet this, in itself, takes the argument no further. For the question remains, what do the terms 'just compensation' or 'full equivalent of the property' mean?

In the various cases before the US/Iran Claims Tribunal, the US claimants have argued strenuously that, whether the taking of their property by Iran was lawful or unlawful under international law, they are entitled under the 1955 Treaty and under customary international law to 'full value' in the sense of 'going-concern value'.⁶⁰ This means that they are claiming not only full asset value, but also compensation for loss of future profits, usually calculated by the Discounted Cash Flow (DCF) method.⁶¹

The claim for loss of future profits—whether pursued in the sense of 'going-concern value' or by some other means—has thus become a central issue; and the difference such a claim would make, in monetary terms, is often enormous. It is therefore useful to review the various 'precedents' or practices which may assist in formulating the relevant rules of customary international law on this point.

Treaty practice

(i) *Investment treaties.* US claimants have argued that some 150 investment treaties, or more, involving over 80 States have used a compensation formula adopting a standard variously described as 'just', 'full', 'equivalent' or 'adequate', and that this is the appropriate standard of compensation

⁵⁹ Award No. 184-161-1, 13 August 1985: see also, to the same effect, *Sola Tiles, Inc. v. The Islamic Republic of Iran*, Award No. 298-317-1 (22 April 1987), at pp. 15-16, where the Tribunal stated: 'the Tribunal's conclusion that the same standard would be required in this case by customary international law as by the direct application of the Treaty itself, obviates the need to decide whether and on what footing it applies here.'

⁶⁰ For an excellent statement of the US position see Clagett, 'Just Compensation in International Law: The Issues before the Iran-US Claims Tribunal', in Lillich (ed.). *The Valuation of Nationalized Property in International Law*, vol. 4 (1987), pp. 31-97.

⁶¹ For a detailed discussion of the DCF method see *Starrett Housing Corp. v. Iran*, Award No. 314-24-1 of Chamber One, 14 August 1987. Essentially the method is used where the fair market value cannot be deduced from share values, actual bids to purchase or the like. The method aims at estimating what a willing buyer could be expected to pay for the business. This involves two factors: (i) an estimate of expected revenues over the remaining life of the asset (or unexpired period of a lease or concession), termed 'future net cash flow', and (ii) the selection of an appropriate discount rate so as to convert the projected, future cash flow into the 'present value' of that cash flow.

The first factor involves some uncertainties, since a given level of profitability cannot be predicted with certainty. The second factor also involves an element of judgment or speculation, for the discount rate selected will depend upon an assessment of risk, inflation, and the 'real rate of interest' in the future. Thus high-risk assets will be discounted at higher rates, to produce a lower present value. In the *Starrett Housing* case the Tribunal did not consider that these elements of uncertainty meant that the damages would be 'speculative', and thus contravene the general rule against awarding speculative damages. But other Tribunals have refused to apply the DCF method, regarding it as inappropriate. See, for example, *Kuwait v. Aminoil*, *International Legal Materials*, 21 (1982), pp. 976-1053 at paras. 154, 164-71, where the Tribunal rejected a DCF analysis and opted for the concept of a 'reasonable rate of return'.

under customary international law, even for a lawful nationalization.⁶² The difficulty with this argument, even if it were accepted that such treaties reflect a customary rule, is that all those concepts remain undefined: there is no express reference to the specific question of lost future profits or going-concern value. There is, as yet, no evidence that in practice, in implementing and applying those vague concepts, States have settled compensation claims on the basis of going-concern value, or some other means of compensating for loss of future profits.

(ii) *Claims settlement agreements*. So far as the so-called 'lump-sum' agreements are concerned, the many post-1945 agreements disclose settlement figures ranging between ten and ninety per cent of asset value, and they disclose no support for anything like going-concern value.⁶³

However, in the *Sedco* case, the US/Iran Claims Tribunal regarded these agreements as being of questionable evidentiary value, and it took the same view of other compensation settlements negotiated between States and foreign companies. It said of these agreements:

Both types of agreements can be so greatly inspired by non-judicial considerations—e.g. resumption of diplomatic or trading relations—that it is extremely difficult to draw from them conclusions as to *opinio juris*, i.e. the determination that the content of such settlements was thought by the States involved to be required by international law. The International Court of Justice and international arbitral tribunals have cast serious doubts on the value of such settlements as evidence of custom. As this Tribunal itself has stated in another context, 'considerations underlying settlements often include factors other than elements of law'. *United States of America and Islamic Republic of Iran*, Decision No. DEC 8-A1-FT (14 May 1982) . . . Both kinds of agreements involve in some degree bargaining in a context to which *opinio juris* seems a stranger.⁶⁴

This means, of course, that the bulk of the relevant State practice is dismissed, including the many voluntary or agreed settlements in the oil industry by which States increased their participation in concessions, licences, joint ventures and the like, enjoyed by foreign companies operating in their territory. In virtually all of these the price of the shares acquired was based on book or asset value.⁶⁵

⁶² The argument was accepted and developed by Judge Brower, the US judge, in the *Sedco* case (above, n. 51).

⁶³ See Lillich and Weston, *International Claims: Their Settlement by Lump Sum Agreements* (1975), Pts. I and II *passim*.

⁶⁴ The references to the attitudes of the ICJ and arbitral tribunals were backed by citations to *Barcelona Traction (Belgium v. Spain)*, ICJ Reports, 1970, p. 3 at p. 40 (judgment of 5 February 1970); and to *Kuwait v. American Independent Oil Company (Aminoil)*, paras. 156–7 (Reuter, Sultan and Fitzmaurice, arbitrators, award of 24 March 1982), *International Legal Materials*, 21 (1982), p. 973 at p. 1036.

⁶⁵ For example, the 1972 General Agreement on Participation (in which the Gulf States acquired participation rights rising to 51 per cent); the 1972 Iraqi nationalization of IPC; the 1973 Sales and Purchase Agreement between Iran and the Consortium members; the 1972–3 Libyan acquisitions of 50 per cent of the equity of AGIP, Occidental, Amerada Hess, Exxon, Mobil; the 1974 Kuwaiti acquisition of 50 per cent of the KOC; the 1975 Venezuelan oil nationalization. Judge Brower, writing in

But many treaties, or other examples of State practice, are in fact based on factors other than 'elements of law'. If all State practice had to be isolated from factors other than 'elements of law', there would be little evidence of State practice—in this or any other field—which could be used as evidence of custom. In effect, therefore, the Tribunal was rejecting virtually all evidence save judicial or arbitral decisions. For this reason Lillich and Weston,⁶⁶ two respected American writers, have recently argued for more status to be given to lump-sum agreements as evidence of the standards of compensation commonly adopted in State practice. They have been openly critical of the attitude of the US members of the US/Iran Claims Tribunal who have been instrumental in persuading that Tribunal to reject the evidence of 'a new consensus on compensation' provided by these agreements.

Judicial or arbitral decisions

(i) *Decisions on unlawful expropriation.* Few of the older decisions are very helpful. Some exclude future profits on the basis that any assessment of damages would be purely speculative,⁶⁷ others on the basis that the claims settlement agreement did not allow such an award.⁶⁸ In any event, as we shall see, there is a very sensible reluctance to treat simple cases of contractual breach⁶⁹ as identical to cases of general expropriation or nationalization for reasons of policy, or for a public purpose, and since most of the earlier cases are cases of contractual breach their value as analogies is limited.

The more contemporary decisions, however, need to be examined with care. The *Chorzów Factory* case⁷⁰ has assumed special importance because of the emphasis laid on it by recent awards of the US/Iran Claims Tribunal. The case itself involved a wrongful seizure by Poland of a nitrate factory belonging to Germany, with Poland acting under an erroneous interpretation of Article 256 of the Treaty of Versailles dealing with war reparations. The current interest of the judgment has arisen from the terms of reference

1975, regarded 'net book value [as] the practical definition of adequate compensation as reflected in most of the settlements . . . in recent years': Brower, 'Recent Developments in the International Law of Expropriation and Compensation', *The Southwestern Legal Foundation* (1975), p. 153.

⁶⁶ 'Lump-sum Agreements: their Continuing Contribution to the Law of International Claims', *American Journal of International Law*, 82 (1988), pp. 69–78. The views of these authors are shared by Dolzer, 'New Foundations of the Law of Expropriation of Alien Property', *ibid.* 75 (1981), pp. 559–60, and Schachter, 'Compensation for Expropriation', *ibid.* 78 (1984), at pp. 121, 126.

⁶⁷ e.g. the *De Caro* case, Italy/Venezuela Claims Commission, *Reports of International Arbitral Awards*, vol. 10, p. 642; the *Valentiner* case, Germany/Venezuela Claims Commission, *ibid.*, pp. 403–4; the *Rudloff* case, US/Venezuela Claims Commission, *ibid.*, vol. 9, pp. 258–9.

⁶⁸ e.g. the *Vinland* case (1925), Administrative Decision No. VII, *US/Germany*, *ibid.*, vol. 7, pp. 203–4, and *Robert Davie Trudgett*, *ibid.*, p. 6, construing the Treaty of Berlin as restricting Germany's obligation to compensate to material losses.

⁶⁹ *Delagoa Bay Railway Company* case (1900), *British Digest of International Law*, vol. 5, p. 535, falls into this category: the Portuguese Government terminated the concession for an alleged breach of the concession by the company which was held to be unfounded.

⁷⁰ *PCIJ*, Series A, No. 17 (1928).

fixed by the Court for an expert inquiry designed to determine the value of the undertaking. They provided as follows:

2. The expert enquiry shall relate to the following points:

I A.—What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

B.—What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

II.—What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922, or been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?

In *Amoco International Finance v. Iran*⁷¹ decided on 14 July 1987 by Chamber Three of the US/Iran Claims Tribunal (Virally, Chairman), the *Chorzów Factory* case was adopted as authority for three propositions:—

(i) A clear distinction must be made between lawful and unlawful expropriations.⁷²

(ii) For unlawful expropriations, international law requires *restitutio in integrum*, or, if impossible, its financial equivalent.⁷³

(iii) For a lawful expropriation the obligation is to pay 'fair compensation', or 'the just price of what was expropriated'.⁷⁴

Chamber Three found in the *Chorzów Factory* case useful guidance in formulating the practical consequences of this distinction. In essence,

The difference is that if the taking is lawful the value of the undertaking at the time of dispossession is the measure and the limit of the compensation, while if it is unlawful, this value is, or may be, only a part of the reparation to be made.⁷⁵

The additional elements of the damages to be paid for an unlawful expropriation were then deduced from the two, different, methods of calculation reflected in Questions I and II posed by the PCIJ in *Chorzów*. The first

⁷¹ Partial Award No. 310-56-3.

⁷² *Ibid.*, para. 192.

⁷³ Para. 193.

⁷⁴ *Ibid.*

⁷⁵ Para. 197.

method (Question I) identifies the two elements of value at the date of expropriation and loss of profits *up to the date of the judgment*; and the first element, 'value', therefore does not itself comprise loss of profits, which is a separate and second element. Thus, 'value' is limited to corporeal assets, contractual rights and other intangibles (such as goodwill or 'future prospects'—but *not* future profits): these are *damnum emergens*. The element of *lucrum cessans*, or future profits, is dealt with separately under Question I B., and is *confined to profits up to the date of judgment*.⁷⁶

The second method (Question II) has exactly the same components, but hypothetically assumed the original owners had been left in possession until the time of judgment. But, again, the profits, real or supposed, to be incorporated into the value of the concern at the date of judgment would only be profits up to that date.⁷⁷

The upshot is that, even for an unlawful expropriation, profits could only be recovered for a relatively short period of time, up to the date of judgment.⁷⁸ It follows, therefore, that the notion of 'going concern value', involving an assessment of loss of profits over the long-term future (and even if discounted by the DCF method) would be wholly inappropriate in a lawful expropriation.

The other cases of unlawful expropriation are not inconsistent with this conclusion, if the expropriation is part of a general policy of 'nationalization' as opposed to an *ad hoc* taking.⁷⁹ The proviso is, as we shall see, important.

Thus in the *Lena Goldfields* arbitration⁸⁰ the arbitrators opted for the present value of the concession, rather than damages for breach (including loss of future profits) as the proper basis for assessment of compensation. The *Sapphire* case⁸¹ was decided *ex aequo et bono* and was never implemented (and was actually quashed by Iranian courts). The *Topco* case⁸² and *BP v. Libya*⁸³ saw a disagreement between Dupuy and Lagergren over whether *restitutio in integrum* was the operative standard, but in any event in neither case did the arbitrator proceed to the actual assessment of damages. In *AGIP v. The Congo*⁸⁴ France claimed and received only 1 franc as token compensation for loss of profits. In *Benevenuti et Bonfant v. The*

⁷⁶ Paras. 200–3.

⁷⁷ Para. 204.

⁷⁸ Para. 205.

⁷⁹ Note that the *Lighthouses* arbitration (*France/Greece*, 1956), 23 ILR 299, was a case of State succession rather than expropriation. The *Norwegian Shipowners* case (1922), *Reports of International Arbitral Awards*, vol. 1, p. 307, was a case of requisitioning and unlawful detention of vessels during time of war.

⁸⁰ (1930), Whiteman, *Damages in International Law*, vol. 3, p. 1738. The USSR rejected the award and the claimant eventually settled for the value of its investment.

⁸¹ *Sapphire International Petroleum Ltd. v. NIOC* (award of Cavin, 15 March 1953): 35 ILR 136, 186.

⁸² *Texaco Overseas Petroleum v. Libya* (award of Dupuy, 19 January 1979): 53 ILR 389.

⁸³ *BP Exploration Co. v. Libya* (award of Lagergren, 1 August 1974): 53 ILR 297.

⁸⁴ *AGIP Co. v. People's Republic of the Congo* (award of 30 November 1979, ICSID): *International Legal Materials*, 21 (1982), p. 726.

*Congo*⁸⁵ the claim was more properly viewed as a claim for recovery of dividends which should have been paid in the past, rather than for future profits.

However, to return to the proviso, we now have a series of US/Iran Claims Tribunal decisions which suggest a clear distinction between the cases of general nationalization and a specific, *ad hoc*, unlawful taking.

In *Starrett Housing Corporation v. Iran*,⁸⁶ the Tribunal held unlawful the respondent's interference, amounting to 'creeping expropriation', in a short-term housing construction project, and accepted the applicability of a DCF analysis to determine fair market value, but without expressly differentiating this taking from a formal, general nationalization (although a 'creeping expropriation' is normally, by its very nature, so differentiated).

But in three cases the Tribunal has specifically made the distinction between an *ad hoc* taking and a taking by way of a general expropriatory or nationalizing measure. These are the *INA* case,⁸⁷ the *Sedco* case⁸⁸ and the *Sola Tiles* case.⁸⁹ Thus, in *Sedco*, the Tribunal contrasted 'a discrete expropriation of alien property' with a 'formal systematic large-scale nationalization, e.g. of an entire industry or a natural resource'.

What seems to emerge from all these cases is that, with an *unlawful* taking, three propositions are possible:

(i) Loss of profits is relevant only up to the date of the award (*Chorzów, Amoco International Finance*).⁹⁰

(ii) 'Full value' may be awarded for an *ad hoc* or discrete taking—but this concept, to be consistent with (i), excludes loss of future profits beyond the date of the award so that 'going concern value' based on profits after that date conflicts with *Chorzów*.

(iii) A lower value—less than 'full'—may be awarded in the case of a formal, systematic, large-scale nationalization.

The difficulty lies in the third proposition, simply because it is difficult to envisage that a tribunal could find unlawful a State's formal, large-scale nationalization. The likelihood that any large-scale nationalization will be held unlawful is remote, simply because discrimination or refusal to pay compensation is in practice unlikely in such a case. Of course, there may well be a dispute over the adequacy of the compensation offered. But the fact that a tribunal awards compensation higher than a State was prepared

⁸⁵ Award of 8 August 1980, ICSID : *ibid.*, p. 740.

⁸⁶ Final Award No. 314-24-1, 14 August 1987. Another inconclusive case is *Phelps Dodge Corp. and OPIC v. Iran*, Award No. 217-99-2, 19 March 1986, where, because the concern was not yet operational, the claimants sought the return of their investment, i.e. their contribution to the share capital, and not compensation for loss of future profits.

⁸⁷ *INA Corp. v. Iran*, Award No. 184-161-1, 13 August 1985.

⁸⁸ *Sedco Inc. v. Iran*, Award No. ITL 59-129-3, in which the claimant sought only the liquidation value of its equity interest in any event.

⁸⁹ *Sola Tiles Inc. v. Iran*, Award No. 298-317-1, 22 April 1987, also involving an unlawful, indirect or 'creeping' expropriation of a tile factory, and therefore not a case of formal nationalization.

⁹⁰ This proposition cannot be restricted to cases of large-scale nationalizations, because *Chorzów* was not really a case involving nationalization.

to offer does not, *per se*, make the nationalization unlawful. The State's offer would have to be so low as to amount to a virtual rejection of the obligation to compensate.

In other words, the relevance of this third proposition (or of the Tribunal's careful distinguishing of the case of general nationalization) is by no means clear where we are dealing with an unlawful taking.

(ii) *Decisions on lawful expropriation*. The decisions on record are surprisingly few. Presumably the reason for this is that a clearly lawful, general act of nationalization is rarely challenged by a legal suit. Settlements will be arrived at either amicably or via 'lump-sum' settlements.⁹¹ Yet there is no reason to suppose that a lawful taking can only be by a general, large-scale nationalization. Virtually all States claim lawful powers to take specific properties, by right of 'eminent domain', and there is no reason to believe that such a taking is unlawful in international law.

A clear decision on lawful nationalization is the *Liamco* case.⁹² Mahmassani held the Libyan nationalization to be lawful, and expressly rejected the argument that international law allowed the recovery of future profits in such a case. He said:

But the question whether or not the concessionaire may claim compensation for all the loss of profits for the unexpired term is still a controversial point which has not been definitely settled.⁹³

The *Aminoil* case⁹⁴ was again treated as a lawful expropriation. What is quite clear is that the claimants' claim for some \$2.5 billion, to represent future profits to the year 2008, calculated by the DCF method, was rejected. What is less clear is the basis of the Tribunal's assessment of compensation. Certainly the Tribunal allowed for the value of physical assets, based on depreciated replacement value. But it is by no means clear that the Tribunal accepted 'going concern value',⁹⁵ or, indeed, any specific head of recovery of future profits.⁹⁶ The Tribunal applied the test of the 'legitimate expectations of the concessionaire'⁹⁷ to produce a figure of \$63 million which is simply not explained in the award. There is reason to believe that the figure was derived from a circumstance peculiar to this specific case,

⁹¹ If this is a correct surmise, it casts some doubt on the wisdom of the refusal of the US/Iran Claims Tribunal to pay much regard to such settlements, for they do, in fact, constitute the bulk of State practice on lawful expropriation.

⁹² *Libyan American Oil Co. (Liamco) v. Libya*, 62 ILR 139 (award of Mahmassani, 12 April 1977).

⁹³ *Ibid.*, p. 207. Thus Mahmassani turned from international law to 'general principles of law', from which he derived 'equity', and applying equity awarded Liamco one-third of its claim for loss of future profits from the Raguba Field, as a share of the profits from 1973-6 (as opposed to the period of thirty years for which the concession was due to run).

⁹⁴ *Kuwait v. American Independent Oil Company (Aminoil)*, *International Legal Materials*, 21 (1982), p. 1041 (award of 14 March 1982, Rcuter, Sultan and Fitzmaurice, arbitrators).

⁹⁵ Young and Owen, and also Teson, *loc.cit.* above (n.55), take the contrary view: but it is submitted they are mistaken.

⁹⁶ See Redfern, 'The Arbitration between the Government of Kuwait and Aminoil', this *Year Book*, 55 (1984), p. 65 at p. 108; Mann, 'The *Aminoil* Arbitration', *ibid.* 54 (1983), p. 213 at p. 221.

⁹⁷ Award, para. 178.

namely that Aminoil had been encouraged by Kuwait to believe that it could continue operations under a service contract for a further seven years, which might reasonably have yielded a service-fee of approximately this amount.

Then there is the case of *Lithgow and others*⁹⁸ arising out of the nationalization by the UK Government, by virtue of the 1977 British Aircraft and Shipbuilding Industries Act, of several British shipbuilding firms. The European Court of Human Rights decided that relations between the British Government and British companies were not governed by international law.⁹⁹ Nevertheless, the compensation figures offered by the Government, and accepted by the Court to be consistent with the European Convention on Human Rights, may have some significance. For if these figures represent a British practice, held to be in conformity with European practice (as reflected in the European Convention), they are cogent evidence of a contemporary practice, judicially tested, in a case of lawful nationalization. Of course, it might theoretically be argued that aliens would be entitled to better treatment, or higher compensation, than that obtainable under the European Convention on Human Rights. However, since international law has traditionally been concerned to secure for the alien the *minimum* standards required by international law, it becomes extremely difficult to suggest that these *minimum* standards must be higher than the standards required by the European Convention on Human Rights.¹⁰⁰

The compensation figures in *Lithgow and others* show that, whilst the aim was to compensate on the basis of notional share values, when the figures are translated into asset values, they are never more, and sometimes less, than net asset value. Or when the figures are translated into a multiplier of annual profits (excluding all asset value) they are equal, on average, to two years' pre-tax profits (or, say, four years' post-tax profits).¹⁰¹

⁹⁸ European Court of Human Rights, judgment of 8 July 1986: 2/1984/74/112-118. See Mendelson, 'The United Kingdom Nationalization Cases and the European Convention on Human Rights', this *Year Book*, 57 (1986), pp. 33-76.

⁹⁹ This despite the wording of Article 1 of Protocol No. 1 to the Convention on Human Rights, to the effect that 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' For a review of the earlier case law on this provision see Higgins, *loc. cit.* above (n. 48), at pp. 357-75.

¹⁰⁰ In its Report of March 1984 on this case the European Commission of Human Rights took a contrary view, suggesting that the public interest may require nationals to bear a heavier financial burden than foreigners: Report of 7 March 1984, at p. 106. It is difficult to envisage Third World States sharing this view.

¹⁰¹ The following table shows claimant, value of net assets (1977), pre-tax profits (1976 or 1977), and the compensation figure in sterling.

Claimant	Net Assets	Annual Profits	Compensation
	m.	m.	m.
Kincaid	5.9	1.3	3.8
Vosper Thorneycroft	25.6	5.5	5.3
BAC	98.7	53.6	95.0
Hall Russell	1.6	.8	1.5
Yarrow Shipbuilders	10.5	3.1	6.0
Vickers	32.4	3.7	14.4
Brooke Marine	4.8	.8	1.8

Whichever way they are looked at, the figures bear no resemblance to the massive totals usually claimed by projecting profits far into the future, and discounting by the DCF method.

On 14 July 1987 Chamber Three of the US/Iran Claims Tribunal delivered an important partial award in the case of *Amoco International Finance Co. v. Iran*.¹⁰² Following on from the discussion of *Chorzów* referred to above,¹⁰³ the Tribunal dealt in detail with the methods of valuation for a *lawful* expropriation. Its starting premiss was 'market value',¹⁰⁴ but the Tribunal immediately recognized that normally there is no open market in circumstances of expropriation. Thus, the Tribunal was forced to consider alternative methods.

The DCF method was rejected as inappropriate to a lawful expropriation.¹⁰⁵ The Tribunal saw its first duty as being 'to avoid any unjust enrichment or deprivation of either Party'.¹⁰⁶ For this reason, it found that net book value was not the appropriate standard, since that would ignore the intangible assets of the concern, such as patents, know-how, goodwill and commercial prospects.¹⁰⁷ Thus, having rejected both methods advocated by the parties, the Tribunal turned to its own evaluation of 'full' compensation, and equated this with 'going concern value'.¹⁰⁸

However, the concept of 'going concern value' adopted by the Tribunal was not that put forward by the US claimants. It embraced (1) physical and financial assets (to which book value might be appropriate) and (2) intangibles, such as contractual rights, goodwill and commercial prospects: but *not* future profits to the date of judgment.¹⁰⁹

It remains to be considered whether, when there is a lawful taking, there is utility in a distinction between an *ad hoc* taking of specific property—for example a taking justifiable by right of eminent domain—and a general nationalization.

It is true that in many legal systems an eminent domain, or *ad hoc*, taking merits full compensation, however lawful. For this reason US claimants before the US/Iran Claims Tribunal have argued that it makes no difference whether the taking is lawful or unlawful, and that 'full' means 'going concern value', using the DCF method: that, apparently, is the position in US law on eminent domain takings. But the extrapolation of this proposition to cases of general nationalization is not, of course, possible on the

¹⁰² Award No. 310-56-3.

¹⁰³ Above, p. 66.

¹⁰⁴ Award, paras. 217-18, invoking the example of the French nationalizations of 1982.

¹⁰⁵ Para. 227. The Tribunal noted that DCF was allied to the notion of restitution, excluded by *Chorzów* in cases of lawful expropriation. It further noted the rejection of DCF in *Aminoil*.

¹⁰⁶ Para. 225.

¹⁰⁷ Para. 255.

¹⁰⁸ Para. 263. The concern in this case was Khemco, a petrochemical plant on Kharg Island established under a joint venture agreement.

¹⁰⁹ Para. 264. The Tribunal then went on to direct the parties to file evidence of these items so that a quantification could be made. This is why, at this stage, the award is only partial.

basis of US law¹¹⁰ (for the US does not nationalize); and it has been expressly rejected by the US/Iran Claims Tribunal, as we have seen. The position towards which the US/Iran Claims Tribunal now seems to be moving (and which *Aminoil* supports) is that there are, in fact, three 'standards' of compensation, i.e. (i) for an unlawful taking, (ii) for a lawful *ad hoc* taking, and (iii) for a lawful, general act of nationalization. And the clear implication is that the third standard is the lowest, which would accord with State practice and the trend in General Assembly resolutions to move towards a concept of 'appropriate' or 'just' compensation.

Curiously, what is lacking in the jurisprudence is a clear explanation of the reasons for a difference in standards between (ii) and (iii), between the lawful *ad hoc* taking and the lawful general nationalization. One might, however, venture a two-fold rationale for this difference. First, the owner deprived of his property *ad hoc* is, as it were, singled out for deprivation by the community. He suffers deprivation because his house, or hotel or whatever, is located in a particular place, and the community needs the space for road-widening, housing-development or other purpose justifying compulsory purchase. But the owner is singled out by the accident of the location of his property: other owners of houses or hotels are not disturbed. This being so, the community compensates him generously, on a 'going-concern value' or full market value.

In contrast, with a general act of nationalization, *all* owners of such businesses are expropriated. None are singled out, and therefore the measure is akin to taxation: it is a form of redistribution of wealth and resources. And, as is the nature of taxation, the owners do suffer a partially confiscatory measure, losing part of their wealth to the State.¹¹¹ Meessen has rejected the taxation analogy,¹¹² in large part because he sees the problem of setting the standard of compensation as an international law problem, not to be resolved by reference to domestic law analogies. But if the general practice of States is dictated by an acceptance of the analogy, it cannot be so lightly dismissed. The question is, can we show that States do so regard their measures of nationalization?

A second rationale would be based on the view that nationalizations commonly affect either those natural resources regarded as subject to 'permanent sovereignty', or else industries which are crucial to the State's economic welfare. Thus it may be argued that the resources and means of production are either already owned by the State, or can properly be

¹¹⁰ Nor, indeed, on the basis of any other system of municipal law where nationalization has occurred. US claimants were unable to cite any State practice to support this particular version of 'full value'.

¹¹¹ See the Fitzmaurice separate opinion in the *Aminoil* case, *International Legal Materials*, 21 (1982), p. 1043 at para. 26: 'Nationalisation, or any other form of takeover, is necessarily confiscatory . . . Nationalisations may be lawful or unlawful, but the test can never be whether they are confiscatory or not; because, by virtue of their inherent character, they always are.'

¹¹² Meessen, 'Domestic Law Concepts in International Expropriation Law', in Lillich (ed.), *op. cit.* above (n. 55), p. 157 at pp. 169-71.

brought into ownership. The private exploiter who is nationalized is therefore entitled to full compensation for his assets, and has a right to recover what he has invested, but he has no right to any expectation of profits, from the moment in time when the State takes over the actual exploitation of those resources or means of production. For profits produced after the State has taken over are the fruit of the State's own efforts: they will not have been 'earned' by the previous owner, and therefore do not represent an element of compensation to which he is entitled.

It may be hoped that the US/Iran Claims Tribunal will provide a rationale for this distinction in future cases. Its decisions seem to be moving in the right direction, producing results which are not alien to general State practice (although the Tribunal pays little regard to State practice in its reasoning). Nevertheless, a reasoned award can be expected to provide a rationale for the essential elements of the award.

THE TIME OF THE 'CONCLUSION' OF A MULTILATERAL TREATY: ARTICLE 30 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES AND RELATED PROVISIONS*

By E. W. VIERDAG¹

I. INTRODUCTION

IN customary international law various different acts are termed the 'conclusion' of a multilateral treaty: the adoption, the opening for signature, the ratification of the treaty, and so on. In the 1969 Vienna Convention on the Law of Treaties the term 'conclusion' (or 'conclude', 'concluded', as the case may be), is used twenty-three times, but the term is not defined in the Convention. Rather, in the Convention, as in customary law, the term appears to be employed in various different meanings, referring to different acts. This would not necessarily be a matter of concern; but several provisions of the Convention refer to the *time* of the 'conclusion' of a treaty, while the acts regarded as constituting 'conclusion' are performed at different points of time.

Some provisions of the Convention speak of 'successive treaties', some of an 'earlier' and a 'later' treaty. These terms are employed several times in, e.g., Article 30, but no indication is given of the basis for determining which of two treaties is the earlier and which the later. Paragraph 5 of Article 30 speaks of the 'conclusion or application of a treaty', which may be an indication that the time of the conclusion or the application is the decisive moment. This supposition is confirmed as regards the term 'conclusion' by the more precise wording of Article 59 (1): '... if all the parties [to a treaty] conclude a later treaty'.

But what is it to 'conclude a treaty'; what to 'conclude a later treaty'? What is the time of the conclusion of a multilateral treaty? In the following an attempt will be made to find answers to these questions, mainly within the context of the Vienna Convention. The proliferation of multilateral treaties in several fields of international law enhances the importance of Articles 30 and 59 of the Convention² on 'Application of successive treaties relating to

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² These provisions are reproduced below, in footnote 60. In 1953, Jenks had already pointed at the consequences of the proliferation of multilateral treaties, and at the possibilities of conflicts between them: 'The Conflict of Law-making Treaties', this *Year Book*, 30 (1953), p. 401 at pp. 404 f.

the same subject-matter' and on 'Termination or suspension of the operation of a treaty implied by conclusion of a later treaty', respectively. Although many treaties contain clauses specifying their relation to other treaties, this is by no means true in all cases.

As will appear, the term 'conclusion' carries very different meanings in the Convention, depending on the provision in which it is employed. So it might not have been easy to conceive a short and simple definition, had the makers of the Convention attempted to draw one up. The meaning of 'conclusion' in the various Convention provisions must if possible be construed within the context of these provisions themselves, and of the Sections and Parts of the Convention in which they appear. The question of the meaning of 'conclusion' in the Convention can be regarded as one 'not regulated by the provisions of the present Convention', as is provided in the eighth paragraph of the Preamble, and therefore, pursuant to this paragraph, the rules of customary international law will continue to govern it. So there is a justification for first having a look at these rules in the customary law of treaties, in order to provide a proper perspective. Another justification for doing so is the importance of an understanding not only of the pertinent provisions of the Convention, but also of provisions of other treaties in which the term 'conclusion' is used.³

Discussions of matters covered by Article 30 (the 'conflict of treaties') sometimes tend to become rather abstract and of a somewhat academic nature. In order to try to avoid this, the reasoning will be illustrated with the help of a practical and concrete case: the question of the compatibility of the 1979 Radio Regulations and the 1966 UN Covenant on Civil and Political Rights with respect to a 'prior consent' requirement for direct broadcasting by satellite.

II. TO 'CONCLUDE' A MULTILATERAL TREATY IN CUSTOMARY INTERNATIONAL LAW

(a) *One single act*

In its simplest form, the conclusion of a treaty is the act of signing it by Heads of State. But it is usual for envoys representing Heads of State to

³ An example from the past would be Article 379 of the Treaty of Versailles (cf. Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. I (1962), p. 132, no. 236). More recent examples include Articles 228 and 238 of the EEC Treaty and 102 and 104 of the Euratom Treaty, and Sections 36 and 37 of the Convention on Privileges and Immunities of the UN. To take just one example from the 1982 UN Convention on Law of the Sea, Article 237 speaks of 'obligations assumed by States under special conventions and agreements [on protection and preservation of the marine environment] concluded previously'.

sign a treaty; and for a very long time this act was regarded as its conclusion.⁴ Thus Vattel wrote in 1758:

Aujourd'hui, pour éviter tout danger et toute difficulté, les princes se réservent de ratifier ce qui a été *conclu* en leur nom par leurs ministres . . . Tout ce qu'a *conclu* le ministre, demeurant sans force jusqu'à la ratification du prince, il y a moins de danger à lui donner un plein pouvoir.⁵

It still occurs with some frequency in the theory and practice of the law of treaties that the adoption of the text of a treaty, e.g. through signature, is regarded as the conclusion of that treaty. The last two American *Digests of International Law*, both Hackworth's and Whiteman's, are very specific in this respect. Hackworth quotes a State Department Treaty Division memorandum, as follows:

The fact that conclusion relates to the conclusion of the negotiations and not to the final act which brings the treaty into force may be confirmed by reference to many treaties . . . where the word 'concluded' is used in connection with the date of signature, the conclusion of the negotiations and the signature regularly being coincident.⁶

And Whiteman states: 'Conclusion is used to refer to the successful outcome of negotiations and agreement upon the terms of the accord reached, even though the agreement reached is subject to ratification or other subsequent approval'.⁷

Likewise, several authors maintain that the term conclusion refers to the adoption of a text. Thus Verzijl defines 'the conclusion of a treaty in its usual present-day form' as 'the act by which the plenipotentiaries of the contracting parties place their signature under a definitive text, thus stating their agreement upon its contents'.⁸ Rosenne observes, under the heading 'Conclusion of Treaties':

Strictly speaking it is the negotiation that is concluded through a treaty . . . The negotiation leads to a text which will be transformed into an internationally binding legal instrument when each of the States . . . entitled to become a party to it has expressed on the international level its consent to be bound by the treaty.⁹

And Holloway states:

A survey of doctrine and practice reveals that as a general rule a treaty is considered to be concluded upon signature, and signature alone. However, it is not uncommon to find the conclusion of a treaty confused with its entry into force, and

⁴ Cf. Jones, *Full Powers and Ratification* (1949), e.g. at p. 87. See on the following Mc Dade, 'The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969', *International and Comparative Law Quarterly*, 35 (1986), p. 499 at pp. 509-10.

⁵ Vattel, *Le Droit des gens*, book II, ch. XII, para. 156 (emphasis added).

⁶ Vol. 5 (1943), p. 30.

⁷ Vol. 14 (1970), p. 19.

⁸ *International Law in Historical Perspective*, vol. 6 (1973), p. 135.

⁹ 'Treaties: Conclusion and Entry into Force', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 7 (1984), p. 465.

consequently to maintain that a treaty is not regarded as having been concluded until it has been ratified.¹⁰

Whatever the significance of such observations, to regard as the 'conclusion' of a treaty one single act, such as the adoption of its text (e.g. through a signature for that purpose, or through a vote at a conference: Article 9), rather than the whole of a complex procedure, has an advantage when the *time* of conclusion of a treaty is of importance. For if, for example, this adoption is a collective act in a complex procedure, then the time of its performance can be readily determined: the day on which the text is adopted by the negotiating States is the 'date' of the treaty. The word generally used to indicate adoption is 'Done': 'Done at Geneva' . . . , 'Done at Vienna' . . . , etc., followed by the date.

However, in this connection the practice must be noticed of introducing one more act into the process of multilateral treaty-making, especially in the practice of the United Nations, namely the 'opening for signature' or the 'opening for signature and ratification'. This act must be considered here because in a great many cases the date of a convention is not the day of the adoption of its text, but the date on which it was opened for signature. This is usually one or a few days later. There is no uniformity in this practice, even within the UN. Only two examples will be given. The Vienna Convention on the Law of Treaties was adopted on 22 May 1969 and opened for signature on 23 May 1969. The latter is the day the Convention is 'done' (Article 85, third paragraph), and by which it is identified. The heading above the introductory note in *Multilateral Treaties Deposited with the Secretary-General*¹¹ says: 'Vienna Convention on the Law of Treaties Concluded at Vienna on 23 May 1969'. It is the opening for signature that is designated as the 'conclusion', therefore, and not the adoption of the text.

It is also possible that the time between the adoption of an instrument and its opening for signature is so long that the date given to it is in the year following that in which it was adopted. This was the case with the International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965 by the General Assembly as an Annex to Resolution 2106 (XX), but opened for signature only on 7 March 1966 (Article 25(2), final sentence). The Convention is generally identified as a '1966' instrument, not as being concluded in 1965.

In the practice of the Hague Conference on Private International Law, conventions are opened for signature about one year after they are adopted.¹²

¹⁰ *Modern Trends in Treaty Law* (1967), p. 43. The similar position of Special Rapporteur Sir Gerald Fitzmaurice in his First Report will be referred to below, in text at notes 27 and 28. Before him, Special Rapporteur Brierly, in his first report, also related 'conclude' to the agreement on the text of a treaty: *Yearbook of the International Law Commission*, 1951, vol. 2, p. 70.

¹¹ *Status as at 31 December 1984* (UN, 1985), p. 695.

¹² 'After the definite text of the convention has been established, consolidation of the result achieved begins. The same Plenary Session of the Conference that prepared the treaty also usually sets an approximate date upon which it will be opened for signature; this is usually about one year after the

In a material sense, opening for signature is not an act of the same significance as adoption and signature. Treaty-making can do without it. It does not interfere with the operation of Article 24(4) of the Convention, which expressly mentions the time of the adoption of the text of a treaty as the time the final clauses become applicable. So it is remarkable that in many cases the opening for signature is identified as the conclusion of a treaty, or at least as the act the date of which serves as the date of the treaty.

However that may be, after the adoption or the opening for signature of a treaty, the treaty-making process becomes individualized. The acts that follow (signature in the sense of Article 12 or Article 14, parliamentary approval, if required, ratification, and also accession, as the case may be) are performed by each State, or rather, by each State organ involved, at its own time. Consequently, in many cases the entry into force of a multilateral treaty occurs at different points of time for the individual States parties to it.¹³ But if 'conclusion' refers to adoption only, these individual acts do not affect the determination of the point in time at which a treaty can be regarded as having been 'concluded'.

(b) *A complex procedure*

The fact that many observers of the law of treaties regard the whole—often complex—procedure, including the expression of consent to be bound, as the 'conclusion' of a multilateral treaty¹⁴ shows that there is not a fixed terminology. This appears also from the use of terms in general treatises on international law.¹⁵ Of course, the question of the meaning of the term 'conclusion' can be evaded through the use of even less specific terms

session at which the text has been prepared, which allows time for the Report on the convention to be prepared and distributed': *Review of the Multilateral Treaty-Making Process*, ST/LEG/SER.B/21 (1985), p. 517.

¹³ 'La date du traité, à laquelle il faut le citer, est celle de la signature. On indique parfois les traités par la date de leur entrée en vigueur: c'est là une mauvaise habitude qui est susceptible d'occasionner des confusions. On ne doit pas non plus les indiquer par la date de leur ratification ou de leur enregistrement . . . [S]i la date de la signature sert ainsi à désigner les traités, ce n'est nullement parce que leur ratification a un effet rétroactif, c'est uniquement parce que, cités par la date de leur ratifications ou par celle de l'échange ou de dépôt de celles-ci, qui peuvent être souvent différentes, les traités, surtout s'ils sont collectifs, auraient eu forcément chacun des dates diverses': Fauchille, *Traité de droit international public* (1926), vol. I/3, pp. 311, 319.

¹⁴ Thus., e.g., Basdevant, 'La Conclusion et la rédaction des traités et des instruments diplomatiques autre que les traités', *Recueil des cours*, 15 (1926-V), pp. 539 ff.; Harvard Research on the Law of Treaties, *American Journal of International Law*, 29 (1935), Supplement, p. 992; Rousseau, *Principes généraux du droit international public* (1944), p. 159; Balladore Pallieri, 'La Formation des traités dans la pratique internationale contemporaine', *Recueil des cours*, 74 (1949-I), pp. 469 ff.; McNair, *The Law of Treaties* (1961), ch. I; Reuter, *Introduction au droit des traités* (1972), p. 64 f., 2nd edn. (1985), p. 53; Bastid, *Les Traités dans la vie internationale: conclusion et effets* (1985), pp. 33-52.

¹⁵ See, e.g., Schwarzenberger, *International Law* (3rd edn., 1957), pp. 428 ff.; Berber, *Lehrbuch des Völkerrechts*, (1960), vol. I, pp. 417-30; Cavaré, *Le Droit international public positif* (3rd edn., 1967), vol. 2, pp. 92 ff.; Parry, 'The Law of Treaties', in Sørensen (ed.), *Manual of International Law* (1968), pp. 191 ff.; Brownlie, *Principles of Public International Law*, (3rd edn., 1979), pp. 602-5.

such as the 'making'¹⁶ or the 'formation'¹⁷ of treaties. The Office of Legal Affairs of the UN Secretariat went very far in this respect by adopting the term 'promulgated' in its Report on the Analytical Review of the Process of Multilateral Treaty-Making.¹⁸ Another expression used extensively in international treaty practice but nowhere defined is to 'enter into' a treaty. This term normally appears to refer to expressing consent to be bound.

Thus in the determination of the time a treaty is 'concluded' one view is that treaties are 'concluded' through a collective act such as adoption of the text in an international conference,¹⁹ and another view is that treaties are 'concluded' after the whole procedure of treaty-making is completed. Very often multilateral treaties specify that adoption shall be followed by signature, ratification or accession, and prescribe that the signatories shall express their consent to be bound 'in accordance with their respective constitutional processes', as this requirement is phrased in Article 110 of the UN Charter. In this latter case the determination of the time of the treaty's 'conclusion' will be difficult because after the performance of the last collective act with respect to the treaty it is for each negotiating State to decide upon the completion of the remainder of the procedure. Thus in this phase each prospective party to the treaty 'concludes' it on its own by acts that are entirely individual. In other words, 'The text of the treaty, when once signed, assumes . . . a sort of life of its own', as Sir Eric Beckett put it in a slightly different context.²⁰ Can it be said that on this view the treaty as such is 'concluded' when the last of the negotiating States has completed the remainder of the procedure and has expressed its consent to be bound? Or when the number of signatories required for entry into force has done so? But that moment may never come, as, for whatever reason, sometimes signatories to treaties never express consent to be bound or only do so after considerable procrastination. This state of affairs prompted the drafters of the Treaty of Versailles to specify in Article 440 that a first *procès-verbal* was to be drawn up as soon as Germany and three of the other signatories had ratified the Treaty. From the date of this *procès-verbal* the Treaty was to come into force between these States, and 'For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty' (para. 7). It has also led to the framing of special conventional regimes, such as that of Article 19 of the ILO Constitution, aimed at curing or reducing the uncertainties surrounding the conclusion of multilateral treaties through complex procedures.

¹⁶ Cf., e.g., O'Connell, *International Law* (2nd edn., 1970), vol. I, pp. 195 ff.

¹⁷ Cf., e.g., Brierly, *The Law of Nations* (6th edn. by Waldock, 1963), pp. 317 ff.

¹⁸ *Review of the Multilateral Treaty-Making Process*, ST/LEG/SER.B/21 (1985), p. 37, n. 5: 'In this report, the term "promulgated" is used in the sense of adoption of the text and opening of the instrument for signature or other forms of acceptance'.

¹⁹ Article 9(2) of the Convention; see Bastid, *op. cit.* above (n. 14), pp. 56 ff.; Reuter, *op. cit.* above (n. 14), pp. 59 f., 2nd edn. (1985), p. 78.

²⁰ Quoted by Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public* (1970), p. 205.

It is clear that 'conclusion' is not a term of art in the customary international law of treaties. This view is affirmed by the terminology employed in the doctrine, as appears from a consultation of such works as De Visscher, *De la conclusion des traités internationaux* (1943), Huber, *Le Droit de conclure des traités internationaux* (1951), or Blix, *Treaty Making Power* (1960).

That 'conclusion' is not a technical term in international customary law appears further from the treaty-making practices of international organizations. One author has expressed the matter as follows:

The terminology used to indicate that an agreement has been concluded is . . . ambiguous. Thus agreements are said to have been reached, finalized, agreed upon, accepted, completed or executed.²¹

It is worthy of note in this context that not only in international law but also in municipal law the term 'conclusion' lacks a precise meaning. The Constitution of Austria, to mention just one example, provides in Article 65(i)(a) that the Federal President 'concludes the treaties' ('Der Bundespräsident . . . schlieszt die Verträge ab'). Obviously the extent of this presidential power needed definition. Thus in the Memorandum submitted by Austria to the UN Secretariat it is pointed out that 'The conclusion of treaties is interpreted as to include their ratification'.²²

That the determination of the meaning of 'conclusion' can also be of importance in matters of private law is well illustrated by cases such as *Kotzias v. Tyser*, where an insurance policy made the payment of a sum of money conditional upon a treaty of peace not being concluded between Great Britain and Germany on or before 30 June 1919. The treaty was signed on 28 June 1919, was ratified, and entered into force on 10 January 1920. The decision was in favour of the plaintiff, because 'the general rule of international law is that as between civilized Powers who have been at war, peace is not concluded until a Treaty of Peace is finally binding upon the belligerents, and that that stage is not reached until ratifications of the Treaty of Peace have been exchanged between them'.²³ As indicated above, the decision might with some persuasiveness have been for the defendant.²⁴

It is surprising that international law has not developed a fixed terminology for so crucial a notion as the conclusion of a treaty. One wonders why

²¹ Schneider, *Treaty-making Power of International Organizations* (1963), p. 43. A UN Conference, convened in Vienna from 18 February to 21 March 1986 for that purpose, adopted the text of the Convention on the Law of Treaties between States and International Organizations or between International Organizations (A/CONF. 129/15, 20 March, 1986). See further below, Part VI.

²² *Laws and Practices concerning the Conclusion of Treaties*, UN Doc. ST/LEG/SER.B/3 (1953), p. 9. See further, Öhlinger, *Der Völkerrechtliche Vertrag im Staatlichen Recht* (1973), pp. 259 f., 297–300. Cf. Bittner, *Die Lehre von den Völkerrechtlichen Vertragsurkunden* (1924), pp. 6 n. 13, 22.

²³ *Annual Digest*, 1 (1919–1922), No. 307. See McNair, *op. cit.* above (n. 14), pp. 195 f.

²⁴ See above, text at notes 6–10; probably the reasoning of the Court was to some extent determined by the fact that the treaty in question was a peace treaty, and goes back to as early a case as *The Eliza Ann*, decided in 1813; see H. Briggs, *The Law of Nations* (2nd edn., 1952), pp. 858–61. Cf. O'Connell, *op. cit.* above (n. 16), pp. 227–8.

this is so. The reason seems to lie mainly in the history of treaty-making: signature and ratification have undergone profound changes, the latter having taken the place of the former as the decisive act.²⁵ But there are still many treaties that become binding upon signature and do not require ratification. If the use of the term 'conclusion' in the Vienna Convention were to be understood as a reference to the meanings of this term in customary international law, then this would imply the introduction into the Convention of the uncertainties just mentioned. In any event, the Convention uses the term in a variety of contexts and these must now be elucidated.

III. TO 'CONCLUDE' A TREATY IN THE LAW OF THE CONVENTION

As already observed in the Introduction above, the Convention does not contain a definition of 'conclusion', 'for the purposes of this Convention'. This would seem to be one of the instances of the 'radical change' in the International Law Commission's approach to its work on the law of treaties in 1960,²⁶ as a definition had been proposed by the Special Rapporteur, Sir Gerald Fitzmaurice, who was succeeded by Sir Humphrey Waldock in 1961. Sir Gerald's definition was as follows:

1. The conclusion of a treaty—which is not the same thing as bringing it into force, though the same act may do both—is the process of giving active assent to the text of the treaty as the basis of an agreement, but not necessarily a consent then and there to be bound by it.

2. Conclusion is usually effected by signature (provided it is full signature), but other acts may have a concluding aspect as provided in Article 28 below.²⁷

In draft Article 28, Sir Gerald distinguished sharply between 'acts concluding' and 'acts operative': the first give 'consent to the text', the second give 'final agreement to be bound'. The second paragraph of Article 28 is in part as follows:

Thus, signature subject to ratification or acceptance is concluding but not operative; signature not so subject is both concluding and operative . . .²⁸

The ILC never came to deal with these provisions, let alone to adopt them.²⁹ But the statements by Sir Humphrey Waldock in his first report on

²⁵ Cf. Jones, *op. cit.* above (n. 4).

²⁶ *Yearbook of the ILC*, 1962, vol. 2, p. 29.

²⁷ Article 26 (*ibid.*, 1956, vol. 2, p. 112).

²⁸ *Ibid.* The observations of Sir Gerald Fitzmaurice made more than thirty years ago in his Commentary have lost nothing of their topicality: 'The term conclusion is ambiguous, and has always given rise to difficulties. When can a treaty be said to be "concluded"? When it is signed, for instance, or when it comes into force? If the former, there is the difficulty that the treaty may never actually come into force. Can a treaty that never comes into force be said to be concluded? On the other hand, there is no doubt that a treaty is always given the date of its signature (i.e. conclusion), never that of its entry into force unless that coincides with signature': *ibid.*, p. 121.

²⁹ See *ibid.*, 1959, vol. 2, p. 91, para. 17.

the differences between his approach and the method of work of his predecessor do not fully make understandable why there was no attempt to insert a definition of 'conclusion' in his draft articles.³⁰ In the ILC's discussion of the draft article on definitions,³¹ the question of the meaning of 'conclusion' was not raised. Nor was this matter discussed in the later stages of the drafting and adoption of the Convention, as far as can be ascertained. So the meaning of the term must be discovered from the content and the context of each provision in which it figures.

However, two provisions have some special importance in this connection, viz. Articles 7 and 2(1)(c). Article 7 deals with the question of full powers; paragraph 2 mentions Heads of State, Heads of Government and Ministers for Foreign Affairs who are considered as representing their States without having to produce full powers for the purpose of performing 'all acts relating to the conclusion of a treaty'. This power is clearly distinguished in Article 7 from the power to adopt the text of a treaty.

What are 'all acts relating to the conclusion of a treaty'? The answer to that question can be found in Article 2(1)(c), which defines 'full powers'.³² These acts are: negotiating, adopting or authenticating the text of a treaty, or expressing the consent of the State to be bound by a treaty. It must be asked whether it can be inferred from the repeated use, in this definition, of the word 'or', that each one of these acts is 'related to' the conclusion of a treaty.³³ If that is the case—and it probably is—then, as was observed above, the meaning of 'conclude' has to be found in each particular instance this term is employed in the Convention. This search for the proper meaning of 'conclude' should also, as the case may be, furnish an answer to the question of the time of the conclusion of a multilateral treaty. It may finally be recalled that the Convention treats 'conclusion' separately from 'entry into force' (Section 1 and Section 2 of Part II, respectively), and that the makers of the Convention have conceived of 'conclusion' *in abstracto* as the complex procedure encompassing the acts specified in Articles 9 to 16, which are contained in Section I of Part II; this section bears the title 'Conclusion of Treaties'.

Before discussing the relevant provisions it must be noted that the twenty-three instances of the use of 'conclusion' (or 'conclude', 'concluded', as the case may be) might as well have been twenty-two or twenty-four. (Without suggesting that the terminology of the Convention is purely

³⁰ Ibid., 1962, vol. 2, p. 30.

³¹ Ibid., 1962, vol. 1, pp. 47–54, 168–72, 214–17, 239–40, 262–6.

³² Article 2(1)(c) reads: '“Full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent to be bound by a treaty, or for accomplishing any other act with respect to a treaty.'

³³ The ILC Commentary on the closing words of Article 2(1)(c) ('any other act with respect to a treaty') is as follows: 'Although “full powers” normally come into consideration with respect to conclusion of treaties . . . , it is possible that they may be called for in connection with other acts such as the termination or denunciation of a treaty . . .': *Yearbook of the ILC*, 1966, vol. 2, p. 189.

arbitrary in this respect, it cannot be said that it reveals any terminological plan either). For example, if in the 1968–9 Conference the word 'concluded' in the ILC draft of Article 1 had not vanished in a quite mysterious way, the number would actually have been twenty-four.

This incident concerning Article 1 may be briefly sketched. The ILC draft of Article 1 read: 'The present articles relate to treaties concluded between States'. A Swedish amendment proposed to delete the word 'concluded'.³⁴ The chairman of the Swedish delegation explained: '[H]e did not think it was correct to state that the convention related to treaties concluded between States, when in fact it was also applied to the conclusion of such treaties'³⁵ —a point of great *finesse* that did not get much response although one remark was made supporting it without explanation.³⁶ There was one negative reaction by a member of the Italian delegation who said that it would be 'a pity to delete the word "concluded", which aptly described the process by which an agreement was formed, was perfected and entered into force'.³⁷ Thereupon draft Article 1 was referred to the Drafting Committee with the Swedish amendment. The Chairman of the Committee later declared that the Committee had deemed it useful to retain the term 'concluded' in Article 1.³⁸ The text approved by the Committee of the Whole and referred to the Plenary Meeting was: 'The present Convention applies to treaties concluded between States'.³⁹ But when Article 1 was introduced by the Chairman of the Drafting Committee to the seventh Plenary Meeting, the word 'concluded' was missing. No explanation for this omission was given. It was not noticed or discussed, and Article 1 as thus submitted was adopted by 98 votes to none in this Plenary Meeting.⁴⁰

The meaning of 'conclusion' in the various Convention provisions will now be examined succinctly, first in the provisions that simply refer to 'conclusion', and next in the provisions that refer to the *time* of the conclusion of a treaty or in which the time factor plays a decisive role otherwise, such as in Article 30.

Article 2 (1). Article 2 (1)(a) defines 'treaty' as 'an international agreement concluded between States . . .'. Obviously, 'concluded' here refers to the earliest phase of treaty-making in Part II of the Convention, namely, adoption of the text: it follows from Articles 2 (1)(c), 5 and 7 that after the adoption there exists, legally, a 'treaty' in the sense of Article 2 (1)(a). The

³⁴ A/CONF. 39/C.1/L.10; *Official Records*, vol. 3, p.110.

³⁵ *Official Records*, vol. 1, p. 11, para. 2.

³⁶ *Ibid.*, p. 18, para. 37: Castrén, Finland.

³⁷ *Ibid.*, p. 13, para. 25: Maresca.

³⁸ *Ibid.* p. 58, para.3.

³⁹ *Ibid.*, para. 2.

⁴⁰ *Ibid.*, vol. 2, p. 3. The *Official Records* of the Conference do not disclose what had happened in the Drafting Committee. The author learnt from Dr Shabtai Rosenne that 'concluded' was deleted at the suggestion of the Soviet delegate: in Russian 'concluded' refers only to the bringing to an end of negotiations, and not to further stages of the treaty-making process which were presumably also covered by draft Article 1.

text is no longer a mere draft, a 'negotiating text', formal or informal; and no further 'act relating to the conclusion of a treaty' needs to be performed.

Article 3. 'Concluded' in Article 3 will likewise refer to the adoption of the text of the international agreement in question. The rules applicable to them independently of the Convention will include the customary rules concerning the making of international agreements.

Article 4. In the 1969 Conference the term 'concluded' in the proposal which is now Article 4 provoked two comments by delegates that are relevant in the present context. The representative of what was then Ceylon observed that the draft article

lacked an essential precision in that it referred to the date of conclusion of treaties. It would be better to speak of the date of the adoption or of the establishment of the text of a treaty as the point of reference for application of the Convention; his delegation considered that a matter of substance and not of drafting.⁴¹

One day later a similar idea was expressed by a member of the Swiss delegation:

[S]ince the notion of the conclusion of a treaty had not been defined in article 2 of the convention, and was thus ambiguous, it would be better to avoid referring to it in [Article 4] and to replace it by that of signature or ratification.⁴²

No action was taken with regard to these suggestions. A proper interpretation of what was thus left ambiguous is one that does not unnecessarily reduce the effectiveness of the Convention. The earliest phase of the making of treaties covered by the rules contained in Part II of the Convention is adoption of the text of a treaty (Article 9); so it seems that in Article 4 'concluded' must be understood as 'adopted': Article 24(4) of the Convention prescribes that the provisions of a treaty regulating its conclusion, entry into force and other matters arising before its entry into force shall apply 'from the time of the adoption of its text'. The Convention contains several rules on the matters referred to in Article 24(4). Therefore it would unduly restrict the operation of the Convention *ratione temporis* if Article 4 were to be read so as to bring under its sway—on the basis of Article 4—only treaties with regard to which States had expressed their consent to be bound (after the entry into force of the Convention for these States).⁴³

Article 6. As the capacity of a State to conclude treaties is essentially the capacity to become bound by treaties, 'conclude' must here mean more than just adoption of the text. In Article 6 the term therefore encompasses the whole process of treaty-making, including the expression of consent to be bound by a treaty.

Article 31. In Article 31 (2)(a), defining the 'context' of a treaty for the purpose of its interpretation as 'any agreement relating to the treaty which

⁴¹ Ibid., p. 319, para. 27; Pinto. Cf. McDade, loc. cit. above (n. 4), p. 507.

⁴² *Official Records*, vol. 2, p. 330, para. 10: Bindschedler.

⁴³ The present author no longer adheres to the view expressed on this point in *American Journal of International Law*, 76 (1982), p. 784.

was made between all the parties in connection with the conclusion of the treaty', the term would seem to refer to the whole procedure, including the phase of the expression of the consent to be bound: relevant agreements can be 'made' in this latest phase as well. In principle, States can agree that a treaty provision is to be understood in a certain way when ratifying the treaty or acceding to it.

Article 32. This provision mentions the 'circumstances' of the conclusion of a treaty and the preparatory work as supplementary means of interpretation. Does the reference to 'the preparatory work'—a term not defined in the Convention—imply that here by 'conclusion' adoption of the text is meant? The 'circumstances' then are between the negotiating States in the sense of Article 2 (1)(e), when they have drawn up the text. In its Commentary on Article 31 the Commission refers to 'preparatory work' in terms of 'the records of treaty negotiations',⁴⁴ which indicates that the preparatory work is finished when the negotiations end, that is, with the adoption of the text. It cannot be said that these are certain indications that 'conclusion' must be understood here as 'adoption'. But doubts have been expressed about looking at later, individual stages of treaty-making and thus having recourse to the 'circumstances' of these stages as supplementary means of interpretation. For example, McNair's position on admitting evidence based on preparatory work was that he believed it would be prudent to exclude evidence of 'unilateral preparatory work'.⁴⁵

Article 40. The phrase 'negotiating and conclusion of any agreement for the amendment of [a] treaty' in sub-paragraph (2)(b) suggests that adoption of the text is meant. The significance of Article 40 is that it secures for all parties to a treaty their right to participate in the drawing up of amending treaties. Whatever action States may take with regard to amending treaties afterwards is outside the scope of the provision.

Article 41. 'Conclude' may mean different things depending on the status of another treaty. This is the case in Article 41: when two or more States conclude a treaty to modify a multilateral treaty, the modification can only be brought about if the *inter se* treaty has the same status as the treaty that is to be modified. In paragraph 1 'conclude' must, if necessary, even encompass the entry into force of the modifying treaty.

The second paragraph of this same article, however, lays down that the parties in question must notify the other parties to the treaty they wish to modify 'of their intention to conclude' the *inter se* treaty. The ILC states in its Commentary that the notification should be 'in advance': it is 'only when a negotiation of an *inter se* agreement has reached a mature stage that notification need be given to the other parties'.⁴⁶ Here the text of the modifying treaty is not yet adopted. Therefore the term 'conclude' in the phrase 'intention to conclude' means the adoption of the text of the treaty.

⁴⁴ *Yearbook of the ILC*, 1966, vol. 2, p. 220.

⁴⁵ McNair, *op. cit.* above (n. 14), pp. 421–3.

⁴⁶ *Yearbook of the ILC*, 1966, vol. 2, p. 235.

Article 46. Provisions of internal law regarding competence to conclude treaties will cover the whole process of treaty-making, from the formulation of full powers and the appointment of negotiators to the exchange or deposit of acts of ratification, the promulgation and the implementation of treaties. Of course, some of these acts and the rules regulating them will not be 'of fundamental importance'. This does not detract from the view that 'conclude' here encompasses the whole process of treaty-making.

Article 49. In Article 49 on fraud, however, 'concluded' seems to refer to conclude in the sense of 'adopt the text', as the fraud occurs through the conduct of 'another negotiating State'. This is, according to Article 2(1)(e), a State which 'took part in the drawing up and adoption of the text of a treaty'.

Article 52. The meaning of 'conclusion' may depend on the phase in which a provision of the Convention is invoked. Article 52 says that 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. Surely this refers to any one of the stages of treaty-making.

Several questions concerning the temporal aspects of the conclusion of a treaty are raised by Article 52. The operation of three treaties is involved in this provision: the Charter of the UN, the Vienna Convention on the Law of Treaties, and the treaty whose conclusion was procured by the threat or use of force. The reference to 'principles of international law embodied in the Charter' implies that customary rules of international law may also be involved.

In its Commentary, the Commission discussed some questions concerning the application of Article 52 in terms of time. It observed that the article concerns the conditions under which 'a treaty may validly be concluded—the condition, that is, for the creation of a legal relation by treaty', as the Commission put it.⁴⁷ However, it cannot be said that to employ the term 'creation' brings any precision to the term 'conclusion' as used in the article. Throughout the Commentary to it, the Commission fails to pronounce upon the exact moment the legal effects of 'conclusion' start to take place. In reply to an observation by the United States that the rule of the article should not have retroactive effect, as this might throw into question the validity of a large number of treaties, notably peace treaties, the Commission refers to the dictum in the *Island of Palmas* arbitration:⁴⁸ 'A juridical fact must be appreciated in the light of the law contemporary to it'. It then states that 'An evolution of the law governing the conditions for the carrying out of a legal act does not operate to deprive of validity a legal act already accomplished in conformity with the law previously in force'. Therefore Article 52 cannot be properly understood 'as depriving of

⁴⁷ Ibid., p. 247.

⁴⁸ *Reports of International Arbitral Awards*, vol. 2, p. 845.

validity *ab initio* a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force'. But statements such as this are not helpful as long as they do not specify at what moment the *initium* is. This also holds for the Commission's proposition that under Article 52 a treaty is void *ab initio*. The term '*ab initio*' is used only once in the Convention itself, in Article 79(4), which prescribes that the corrected text of a treaty shall replace 'the defective text *ab initio* . . .'. The earlier drafts of this paragraph and the Commentary on the final one provide no clue as to when the *initium* is, however, because they indicate various moments in time.⁴⁹

Similarly, with regard to the question from which date 'the modern law should be considered as in force for the purposes of the present article', the Commission thought it would be 'illogical and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties'. The ILC goes on to point out that the rule of what is now Article 52 'is applicable at any rate to all treaties concluded since the entry into force of the Charter', that is, since 24 October 1945. This, however, is not a well-defined group of treaties as long as the meaning of 'concluded' is not made clear. Moreover, as a result of an amendment, accepted by the Conference, the Commission's draft (' . . . in violation of the principles of the Charter of the United Nations') was changed into ' . . . in violation of the principles of international law embodied in the Charter of the United Nations'.⁵⁰ Thereby the single clear and precise time element so far supposedly contained in the provision (viz., 24 October 1945) was discarded.⁵¹

Article 58. As is the case with Article 41, the meaning of 'conclude' in Article 58 differs according to the status of another treaty. To conclude an *inter se* agreement to suspend the operation of a treaty means necessarily that the agreement thus concluded is itself operative if it is to suspend that other treaty's operation effectively. And again, the second paragraph requires notification by the parties in question of their 'intention to conclude'.⁵²

Article 74. To lay down that severance or absence of diplomatic relations

⁴⁹ Article 24(3) of the first draft provided that 'the corrected . . . text shall be deemed to have *come into force* on the date of the original text . . .'; idem, draft Article 25(5). In the 1962 draft it was laid down that the corrected text 'shall replace the original text as from the date the latter was *adopted* . . .' (Article 26(3); Article 27(5)). The term '*ab initio*' was first introduced in the 1965 draft (Article 26(4)(a)), and maintained in the 1966 final draft (Article 74(4)(a)). The Commentary to this provision says: 'Since what is involved is merely the . . . correction of an already accepted text, it seems clear that . . . the corrected . . . text should be deemed to operate from the date when the original text *came into force*' (emphasis added) (Commentary: *Yearbook of the ILC*, 1966, vol. 2, p. 273). Is, then, an 'accepted' text a text that has come into force? That would place the '*initium*' very late in the process; it might even never occur. In the light of the term '*ab initio*', 'accepted' might rather refer to 'adopted'. All this is highly inconclusive, of course.

⁵⁰ *Official Records*, vol. 3, pp. 172-3; *ibid.*, vol. 2, pp. 90-3.

⁵¹ See for further criticism of the provision Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn., 1984), p. 180.

⁵² The second paragraph of Article 58 was added by the UN Conference: *Official Records*, vol. 1, p. 350.

does not prevent the conclusion of treaties must, in order to have any meaning, refer to the whole process of treaty-making, including the expression of consent to be bound.

IV. THE TIME A MULTILATERAL TREATY IS 'CONCLUDED'

Several Articles of the Convention speak of the time of the conclusion of a treaty, or of treaties concluded 'earlier' or 'later'. These are: Articles 30, 48, 53, 59 and 62. It must be seen how the time when a treaty is concluded can be determined in each of these provisions. First, Articles 48, 53 and 62 will be looked at.

Article 48. Article 48(1) provides that a State may invoke error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. The ILC, in its Commentary, does not broach the question at what point of time the error must have occurred to produce the effect specified in Article 48(1). In the case of a complex procedure of treaty-making, error can occur at various stages: various organs involved in the procedure may be in error. But the structure of the provision points to an early error, made by representatives in the stage of adoption of the text, or of signature subject to ratification. The consent to be bound, which comes later, is supposed in Article 48 to have been expressed already, and now appears to rest on an erroneous basis. So the time of the conclusion of the treaty in Article 48 is the moment the text of the treaty is adopted.

Article 53. Article 53 lays down, *inter alia*, that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. A great deal of attention has been paid to the question of *jus cogens* and its place in the Convention.⁵³ For present purposes the focus is on the phrase 'at the time of its conclusion', which did not occur in the provision as drafted by the ILC. It results from an amendment tabled by the US in the Committee of the Whole of the UN Conference.⁵⁴ From the wording of the amendment and the explanation of it by US delegates in the Committee⁵⁵ it is clear that the main point of the amendment was not so much in the phrase that is considered here but in the words that followed it. Ironically enough, however, on the suggestion of the delegate from Chile, the

⁵³ See, on the background of Article 53 and its drafting history, Sztucki, *Jus cogens and the Vienna Convention on the Law of Treaties* (1974); Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976). See also Sinclair, *op. cit.* above (n. 51), pp. 203–26, with numerous further references.

⁵⁴ A/CONF. 39/C.1/L.302; see *Official Records*, vol. 3, pp. 174–5. The amendment was to replace the ILC draft (text: *ibid.* at p. 173) by the following: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory rule of general international law which is recognized in common by the national and regional legal systems of the world and from which no derogation is permitted.'

⁵⁵ *Official Records*, vol. 1, pp. 295, 330.

amendment was split into two parts and the Committee voted separately on these parts, adopting the first ('at the time of its conclusion') and rejecting the second.⁵⁶ What was thus adopted?

Sinclair observes that the Commission's commentary already indicated that Article 53 was not to operate retroactively, and that the first part of the US amendment 'merely clarified the underlying meaning of the text'.⁵⁷ However that may be, it must be asked whether a treaty conflicting with a norm of *jus cogens* can be validly concluded at all, at whatever time it is understood to have been so concluded. Can it be validly negotiated? Can it be validly adopted?⁵⁸ It seems not, as the invalidity must be assumed to invalidate 'all acts relating to the conclusion' of a treaty violating *jus cogens*, to use the terms of Article 7. This will include the adoption of the text of such a treaty. As a result, neither the signature nor the expression of consent to be bound by it pending the entry into force will activate the obligation laid down in Article 18, namely, not to defeat its object and purpose.

Article 62. Article 62 regulates the effects of a fundamental change of circumstances 'which has occurred with regard to those existing at the time of the conclusion of a treaty'. As this provision itself refers to these circumstances as constituting 'an essential basis of the *consent . . . to be bound*' by the treaty, and further speaks of 'obligations still to be performed under the treaty', 'conclusion' clearly means here that the State in question has expressed its consent to be bound. Indeed, if consent to be bound by a treaty has not yet been expressed, no rule on fundamental change of circumstances needs to be invoked by a State as a ground for disengaging itself from it.⁵⁹

V. ARTICLES 59 AND 30 OF THE CONVENTION⁶⁰

(a) *Article 59*

Although Articles 59 and 30 of the Convention are closely related to one another, they differ in various respects. Article 59 provides for termination

⁵⁶ Ibid., p. 333.

⁵⁷ Op. cit. above (n. 51), p. 219.

⁵⁸ These views need not be in conflict with Articles 69 and 71. See also Sir Gerald Fitzmaurice's reflections on nullity and voidness in *Yearbook of the ILC*, 1958, vol. 2, p. 31.

⁵⁹ Cf. McNair, op. cit. above (n. 14), p. 134; Bastid, op. cit. above (n. 14), p. 45.

⁶⁰ Article 30 reads as follows: '*Application of successive treaties relating to the same subject-matter.*

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

or suspension of the operation of a treaty as a whole, while Article 30 is concerned with treaties that remain in force. So in cases of termination or suspension Article 59 is *lex specialis*.⁶¹ It operates in part on the intention of the parties, which appears from the later treaty, or is established otherwise. In the case of sub-paragraph 1(b) of Article 59 the intention is not expressed in the later treaty, but one might say that it is implied in the drawing up of a treaty that cannot be applied simultaneously with the other one. While Article 59 concerns the replacement of a treaty in its entirety, Article 30 mentions 'provisions' of treaties as well.

An important characteristic of Article 59 is that it requires that *all* the parties to a treaty agree to terminate it or to suspend its operations and *all* become parties to the new treaty that supersedes the old one. The provision is silent about possible participation of other States in the new instrument; but the text does not exclude this. In any case, the requirement that all parties are involved probably results in a limited application of Article 59: the Article will function optimally with regard to treaties among States that form relatively small, coherent groups. For example, treaties concluded within an organization such as the European Communities require unanimity and enter into force for all members at the same time.⁶² So if the question should arise as to the abrogation of one such treaty by another in the sense of Article 59, the exact place in time of each treaty can be determined, and these treaties will be 'earlier' and 'later' for all member States equally.

The application of Article 59 is dependent on the intention of the parties. This entails that the provision is essentially of a residual nature: the intention of the parties will always prevail. In a case where the intention is

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to Article 41, or to any question of the termination or suspension of the operation of a treaty under Article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations toward another State under another treaty.'

Article 59 reads as follows: '*Termination or suspension of the operation of a treaty implied by conclusion of a later treaty.*

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.'

⁶¹ The ILC Commentary is very clear with respect to this: Article 30 'comes into play only *after it has been determined under [Article 59] that the parties did not intend to abrogate, or wholly to suspend the operation of, the earlier treaty*': *Yearbook of the ILC*, 1966, vol. 2, p. 253 (emphasis in original).

⁶² Article 33(2) of the Single European Act of 17 and 28 February 1986 reads: 'This Act will enter into force on the first day of the month following that in which the instrument of ratification is deposited of the last Signatory State to fulfil that formality': text in *International Legal Materials*, 25 (1986), pp. 506 ff. See also Article 247(2) of the EEC Treaty, 25 March 1957. The type of treaties meant here is, for example, the subsidiary conventions concluded among EC members.

implied (sub-paragraph 1(b)) it must of course somehow be determined that termination or suspension of the operation of the treaty in question was intended by all the parties to the treaty to be abrogated. If that determination cannot be made, Article 30 is applicable, not Article 59.

What is the meaning of 'conclude' in Article 59? The provision speaks of 'parties', which indicates that the treaty to be terminated or suspended is a treaty in force (Article 2(1)(g)). Consequently, it seems that the later treaty can only effectively terminate it or suspend its operation if it is itself in force.⁶³ In theory, if only the text of a treaty has been adopted, this text can be replaced through the adoption of another text by all the negotiating States. But this is not the situation envisaged by Article 59 according to its terms. So 'conclude' in Article 59 refers to the whole process of treaty-making, including the entry into force of the later treaty.

(b) *Article 30*

1. *The Conference of 1968 and 1969*

Article 30 is special among the provisions discussed here, because in the Conference some significant statements were made with respect to the problem of the time of the conclusion of (successive) multilateral treaties relating to the same subject-matter. There are first of all the questions put by Sir Ian Sinclair in the thirty-first meeting of the Committee of the Whole. Sir Ian observed in part:

. . . [I]t might sometimes be difficult to determine which was the earlier and which the later treaty. Supposing that Convention A was signed in 1964 and came into force in 1966, whereas Convention B was signed and entered into force in 1965, which of them would be earlier? If Convention B were regarded as the earlier on the grounds that the date of entry into force was decisive, would the answer be different if Convention A had entered into force provisionally in 1964? To take a different example, supposing a multilateral convention was opened for signature in 1960, State A ratified it in 1961, and the convention entered into force in 1962. Then State A and State B concluded a bilateral treaty on the same subject in 1963 which entered into force in 1964, after which State B acceded to the multilateral convention in 1965. Which of the treaties was the earlier and which was the later? In State A's view, the multilateral convention was the earlier but in State B's view it was the later.⁶⁴

In the eighty-fifth meeting he said that there was an element of ambiguity in the word 'successive'. He reverted to the example of a Convention A, signed in 1964, and another, B, signed in 1965. If Convention B entered

⁶³ The position taken here does not mean a dogmatic return to some '*acte contraire*' theory with regard to the revision, modification or termination of treaties (cf. Leca, *Les Techniques de révision des conventions internationales* (1961), pp. 151 ff.; Rousseau, *op. cit.* above (n. 14), pp. 361 f.); it is inspired by considerations of effectivity.

⁶⁴ *Official Records*, vol. 1, p. 165.

into force in 1966 and Convention A not until 1968, the question arose which should be regarded as the prior treaty. He then stated:

His delegation's opinion was that the decisive date should be that of the adoption of the treaty; it based that view on paragraph 1 of article 56 [numbered 59 in the text as adopted], which referred to the conclusion of a later treaty.⁶⁵

The delegation of the UK stated that it would welcome the Expert Consultant's views on this matter. The Expert Consultant gave his views in the ninety-first meeting, recorded as follows:

First, he thought that the United Kingdom representative had been correct in assuming that, for purposes of determining which of two treaties was the later one, the relevant date should be that of the adoption of the treaty and not that of its entry into force. His own understanding of the intentions of the International Law Commission confirmed that assumption. The notion behind it was that, when the second treaty was adopted, there was a new legislative intention; that intention, as expressed in the later instrument, should therefore be taken as intended to prevail over the intention expressed in the earlier instrument. That being so, it was inevitable that the date of the adoption should be the relevant one.

Another question, however, arose: that of the date at which the rules contained in article 26 [now 30] would have effect for each individual party. In that connexion, the date of entry into force of a treaty for a particular party was relevant for purposes of determining the moment at which that party would be bound by the obligations arising under article 26. The provisions of that article referred to 'States parties'; they therefore applied only when States had become parties to the two treaties.⁶⁶

Before the vote on draft Article 26 (now Article 30) was taken in the thirteenth Plenary Meeting, the Ceylonese delegation declared that the crucial date for the determination of which was the earlier and which the later instrument 'should be the date when the text of the new treaty had been finally and formally established'. The delegation concurred with the explanation of the Expert Consultant, and suggested that a sentence be added to the article under consideration 'to the effect that the date of the adoption of the text was relevant in determining which was the later treaty'. No formal proposal was made, however, and the article was thereupon adopted without further discussion of this matter.⁶⁷

There is a dichotomy in the Expert Consultant's position: adoption of a treaty on the one hand, and its 'effect for each individual party' on the other hand. This dichotomy corresponds with two types of 'conflicts of treaties' that can be distinguished. The first type of conflict is traditionally that of a treaty between A and B and a later, incompatible treaty between A and C. The conflict concerns concrete rights and duties. It is treated as involving such questions as the validity of the second treaty, A's capacity to conclude

⁶⁵ Ibid., vol. 2, p. 222.

⁶⁶ Ibid., p. 253, paras. 39 and 40.

⁶⁷ Ibid., paras. 56, 57.

it, and C's good faith in doing so, which depends *inter alia* on C's knowledge of treaty AB. The second type of conflict is that between abstract norms, as in legislation. It involves 'law-making conventions', as Jenks called them.⁶⁸ Here concepts of hierarchy come into play, of *lex generalis* that yields to special rules, and of *lex posterior*, the later rule, which sets aside the earlier one.⁶⁹ The discussion in Oppenheim is characteristic: with regard to the first conflict mention is made of 'the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results beneficial to the law-breaker.' But this principle does not apply 'to subsequent multilateral treaties . . . partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community . . .'.⁷⁰

This notion, it would seem, corresponds with the first part of the statement by the Expert Consultant, where he speaks of 'a new legislative intention'. In this paragraph (39), adoption is rightly identified as the common act performed by all or by a required majority of the adopting States at a specific time. There is no doubt that the word 'legislative' is used deliberately, although the act of the adoption of the text of a treaty is not a legislative act, even if the treaty is a multilateral one containing general rules of behaviour. It expresses the intention of the negotiating States that the treaty will in due time become a binding instrument. This type of conflict concerns conflicts between abstract norms, not between concrete rights and obligations. Accordingly, the distinction between abstract norms and concrete rights and obligations is important in an examination of Article 30. 'Abstract norms' refers here to treaty rules as such, irrespective of the legal position of signatories or States bound by the rules. 'Concrete rights and obligations' refers to the specific position of a particular State with respect to one or more treaties.⁷¹

Article 30 speaks of 'States parties to successive treaties', so the Expert Consultant could not confine himself to pointing to the adoption of treaties: a treaty that is only adopted has as yet no 'parties' in the sense of Article

⁶⁸ Loc. cit. above (n. 2).

⁶⁹ See on the whole question, e.g., McNair, op. cit. above (n. 14), pp. 218 ff; Rousseau, op. cit. above (n. 14), pp. 765-814; Schwarzenberger, op. cit. above (n. 15), pp. 472-87; Harvard Research, loc. cit. above (n. 14), pp. 1009-29; Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), ch. 5; recently, Karl, 'Conflict between Treaties', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 7 (1984), pp. 467-73, with bibliography. On Article 30, see Sinclair, op. cit. above (n. 51), pp. 93-8.

⁷⁰ Oppenheim (ed. Lauterpacht), *International Law*, vol. 1 (8th edn., 1955), pp. 894, 895. Cf. Leca, op. cit. above (n. 63), pp. 215 ff., and Zuleeg, 'Vertragskonkurrenz im Völkerrecht, Teil I', *German Yearbook of International Law*, 20(1977), p. 246 at pp. 262 f. See also Nascimento e Silva, 'Le Facteur temps et les traités', *Recueil des cours*, 154 (1977-1), p. 216 at pp. 252-64.

⁷¹ On the conflict of legal rules see Karl, *Vertrag und Spätere Praxis im Völkerrecht*, (1983), pp. 58 ff.

Special Rapporteur Fitzmaurice dealt with the conflict of treaties very much in terms of conflict of treaty obligations. Cf. para. 73 of his third report (*Yearbook of the ILC*, 1958, vol. 2, p. 39). See below, text at n. 123.

2(1)(g) (a 'party' is a State bound by a treaty and for which the treaty is in force). Therefore 'another question' arose, that of concrete rights and obligations: the date at which the rules of Article 30 will have effect for each individual party. The time relevant for the determination of a treaty as being earlier or later for the purpose of determining the moment at which a State would be bound by the obligations arising under Article 30 would be 'the date of entry into force of a treaty for a particular party', in the words of the Expert Consultant.

With due respect, this view cannot be considered an adequate answer to Sir Ian's questions, as in a great many cases that date will be a different one for a number of parties to the treaty. And that was precisely the reason why these questions were presented to the Conference. The criterion advanced cannot serve in all cases for the purpose of fixing a time for a treaty as such *vis-à-vis* another treaty as such, in an objective sense, as earlier or later. It cannot fix the time at which individual parties to two or more treaties have incurred incompatible treaty obligations. In his book on the Convention, Sir Ian Sinclair formulates the crux of the subject-matter of Article 30 as follows:

[I]t seems clear that, in determining which treaty is the 'earlier' and which the 'later', the relevant date is that of the adoption of the text and not that of its entry into force . . . But, of course, the rules laid down in Article 30 have effect for each individual party to a treaty only as from the date of entry into force of the treaty for that party.⁷²

And indeed, the second part of Sir Humphrey Waldock's statement suggests that what is important is not so much the state of affairs with respect to two or more treaties in the abstract, but the concrete treaty situation of particular States at a particular moment of time. In other words, concrete treaty rights and obligations are decisive for the operation of the rules of Article 30. It remains to be seen to what extent the terms of Article 30 reflect this submission.

2. *The terms of Article 30*

The title of Article 30 speaks of the 'application' of treaties, a term that suggests instruments that are and remain in force. But the term 'successive' does not, as was seen above, disclose any indication of the times at which particular treaties come into force for particular States. Likewise, paragraph 1 mentions concrete rights and duties of States parties, thereby indicating treaties in force, but here again, the term 'successive' does not indicate the time at which these become operative.

Paragraph 2 does not give rise to any problems in this connection. Nor does paragraph 3, which refers to treaties in force. The scope of this paragraph is limited, as it operates in cases in which there is unanimity twice, i.e. with regard to both instruments. The provision is silent about possible

⁷² Sinclair, *op. cit.* above (n. 51), p. 98.

participation of other States in the new instrument; as was also the case with Article 59, the text of the third paragraph of Article 30 does not exclude this. It gives precedence unreservedly to the 'later' instrument. As both instruments are in force,⁷³ the dates of their entry into force can serve as the dates on the basis of which they can be located in time as earlier and later.⁷⁴

Paragraph 4 applies in cases where there is no identity of parties to the treaties. Sub-paragraph (a) concerns a situation that corresponds with the one envisaged in paragraph 3, so it contains the same *lex posterior* rule. The corresponding situation is also one of unanimity, albeit on a smaller scale than in paragraph 3; but *inter se* the States are all bound by two treaties, which are in force. As to their dates, what was said about the dates with regard to paragraph 3 applies here too.

Where unanimity does not occur twice, which in practice is probably most often the case, sub-paragraph (b) will apply.⁷⁵ Paradoxically, this sub-paragraph, which can be regarded as crucial in terms of the subject-matter of Article 30, does not deal with 'application of successive treaties' at all. This provision concerns only one treaty, namely the treaty to which both States are parties, only one of these States being party to two 'successive' treaties. Sub-paragraph (b) is framed as involving only two States (a bilateral treaty); but there is no reason why the same rule should not cover a treaty between a greater number of States as well (a multilateral treaty). However that may be, as long as only one treaty governs the mutual rights and obligations of States in a case to which sub-paragraph (b) is applicable, the question what is the time of the conclusion of treaties does not arise.

It is possible that the observance by the State of the one treaty to which the other State is also bound necessarily leads to the non-observance of another treaty to which the former State is bound together with one or more (other) States. That circumstance is mentioned, albeit in a somewhat oblique way, in paragraph 5, in particular where it specifies that paragraph 4 is without prejudice to 'any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of

⁷³ 'The present [paragraph] applies only when both treaties are in force and in operation . . .': ILC Commentary on Article 30(3), *Yearbook of the ILC*, 1966, vol. 2, p. 216.

⁷⁴ Zuleeg's observation that the *lex posterior* rule offers no solution if both instruments are concluded at the same time (loc. cit. above (n. 70), pp. 262-3) is of course correct. The present author is aware of only one case in which two potentially applicable instruments were considered, one concluded *two* days after the other: the General Claims Convention of 8 September 1923 and the Special Claims Convention of 10 September 1923. See the *Gorham* claim before the US-Mexican Claims Commission, 1930 (*Reports of International Arbitral Awards*, vol. 4, p. 640 at p. 643); cf. Schwarzenberger, op. cit. above (n. 15), pp. 479-80.

⁷⁵ In the text of this paragraph as drafted by the ILC, there were two sub-paragraphs, (b) and (c), dealing separately with an earlier and a later treaty (text in *Official Records*, vol. 3, p. 147). A Swedish-Romanian amendment (ibid., p. 148) sought to shorten the paragraph by combining (b) and (c) in one sub-paragraph (b). No change of substance was intended according to the Swedish delegate: ibid., vol. 1, p. 164; the only aim was to make the text of the provision as concise as possible (Romanian delegate, ibid., p. 165). The amendment was approved in the Committee of the Whole (ibid., vol. 2, p. 253), and next by the Plenary Meeting without further discussion of this point (ibid., p. 57).

which are incompatible with its obligations toward another State under another treaty'. It has been pointed out that in sub-paragraph 4 (b) only one treaty is legally operative, the treaty to which both States involved are parties (a number of States, in the case of a multilateral treaty). The other treaty is mentioned, of course, because this other treaty is the reason why the regulation in question is placed in Article 30. It is submitted, however, that there is in Article 30 no relevant legal connection between the abstract legal rules contained in 'successive' treaties on the one hand, and the concrete rights and obligations of States on the other hand. As a result, Article 30 fails to establish a common regime for the States involved. Consequently, there is an inadequacy and inconsistency in Article 30 with regard to the time of treaties and the time of rights and obligations: the occurrence of treaties (legal rules) in time does not necessarily correspond at all with the actual acquisition of rights and the incidence of obligations under treaties in force by particular States parties to them. It is one thing to adopt the text of a multilateral treaty, and to adopt the text of another treaty at a later moment of time; it is another thing to identify at a given moment the concrete rights and obligations of two or more States under two or more treaties in force.

It is not intended to suggest that there is no point in comparing, in the abstract, two or more treaties in order to examine their mutual compatibility. One has only to consult the advisory opinion of the Permanent Court on the projected *Austro-German Customs Union*⁷⁶ to see the relevance of a comparison in the abstract. On the other hand the judgment of this Court in the *Oscar Chinn* case and the dissenting opinions by Judges van Eysinga and Schücking⁷⁷ give a clear example of a very concrete question of compatibility. The question of the compatibility of the North Atlantic Treaty with the UN Charter is a well-known example of compatibility in the abstract in the post-Second World War era.⁷⁸ In principle, abstract treaty rules are intended to become in due time sources of concrete rights and obligations of States. There is of course no separation between rules and rights; there is only the difference in time in many cases, especially where multilateral treaties require complex procedures for their completion and entry into force. As a result of this requirement there is no such thing as the 'time' of a multilateral treaty except the time of the adoption of the text. There are many moments in time that are important for a treaty: signature, ratification, entry into force for the States that together constitute the number of parties necessary for its entry into force, etc.

As already indicated, Article 30 bases its operation on a general reference

⁷⁶ *PCIJ*, Series A/B, No. 41 (1931). The Court had to consider three instruments, two of which were in force: the Treaty of St Germain, 1919, Article 88, and the Protocol concerning the Financial and Economic Reconstruction of Austria of 4 October 1922. The third instrument was merely drawn up in March 1931; it never entered into force. See further below, text at nn. 102–104.

⁷⁷ Series A/B, No. 63 (1934).

⁷⁸ Cf., for example, Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations* (1950).

to 'successive treaties', but it can only be operative on the basis of treaty rights and obligations of States. These, however, only rarely have a common date. When a treaty prescribes that it shall enter into force after a certain number of States have deposited their acts of ratification or accession, then there is a common date only for the—often small—group of States that have done so. There is no common date for the States that adhere later. So in most cases there are different dates for most individual parties to a multi-lateral treaty. Article 30 rests on an assumption that will often appear not to be correct, as it fails to take account of the complication in time of multi-lateral treaty-making through complex procedures.

3. *An illustration: Article 19(2) of the UN Covenant on Civil and Political Rights, and the 'prior consent' for direct broadcasting by satellite laid down in the 1979 Radio Regulations*

It is appropriate to try to illustrate the above with the help of at least one example from recent practice. Some time ago the question arose of a possible conflict between the UN Covenant on Civil and Political Rights, adopted by the General Assembly in 1966,⁷⁹ and the International Radio Regulations, adopted by the 1971 World Administrative Radio Conference, organized by the ITU in that year.⁸⁰ On the one hand, Article 19 (2) of the former instrument grants, in sweeping language, to everyone *inter alia* the freedom to impart information of all kinds, regardless of frontiers, through any media of his choice.⁸¹ On the other hand, Article 428 A of the latter prescribes that television broadcasting through a direct broadcasting satellite licensed by a State, which can also be received in the territory of neighbouring States, shall be subject to previous agreements of the licensing State with these neighbouring States.⁸² This requirement is interpreted by

⁷⁹ Adopted 16 December 1966; in force since 26 March 1976. Text in, *inter alia*, *United Nations Treaty Series*, vol. 999, pp. 171 ff.

⁸⁰ Text in, e.g., Plowman (ed.), *International Law Governing Communications and Information* (1982), p. 256. According to Article 42(1) of the International Telecommunications Convention, 'The provisions of the Convention are completed by the Administrative Regulations which update the use of telecommunication and shall be binding on all Members'. The Regulations presently operative were generally revised by the 1979 Geneva WARC and entered into force on 1 January 1982. See Noll, 'The International Telecommunication Union', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 5 (1983), pp. 177–83 at p. 178.

⁸¹ Article 19(2) reads as follows: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.

⁸² See Christol, *The Modern International Law of Outer Space* (1982), pp. 605–719, especially pp. 661–3; Matte (ed.), *Space Activities and Emerging International Law* (1984), pp. 423–69 at pp. 460–9. Article 428 A has been renumbered and is now Article 6222(3) of the 1979 Radio Regulations. It runs as follows: 'In devising the characteristics of a space station in the broadcasting satellite service all technical means available shall be used to reduce to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries.' As some 'spillover' is almost always unavoidable, it is said that agreements will have to be reached by almost all States planning to engage in direct broadcasting by satellites, or to authorize public or private organizations to do so. See on this further, e.g., Dausen, 'Direct Television Broadcasting by Satellites and the Freedom of Information', *Journal of Space Law*, 3(1975), p. 59; Rudolf and Abmeier, 'Satellitendirektfunk und Informationsfreiheit', *Archiv des Völkerrechts*, 21(1983), pp. 1–36;

many as implying 'prior consent'.⁸³ Obviously, the comprehensive right granted by Article 19 of the 1966 Covenant to broadcasting entities would be reduced to a fiction if its enjoyment were dependent on the prior consent of one or more States:

In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a 'right of assent', a 'right of veto', which at the discretion of one State paralyses the exercise of the . . . jurisdiction of another. . .

as the Arbitral Tribunal in the *Lac Lanoux* case stated.⁸⁴

It seems quite natural to consult Articles 30 and 59 of the Convention in order to find an answer to the question of the relation between the instruments, and which of the two provisions must prevail.⁸⁵

As to the applicability of Article 59, it does not appear from the Radio Regulations, nor can it otherwise be established, that all the parties to the 1966 Covenant intended to terminate the operation of the Covenant, or at least that of Article 19(2). Consequently the question is not governed by Article 59. As to the applicability of Article 30, this provision also contains conditions that must be satisfied if it is to be operative. First, the question of the relation of two or more particular (successive) treaties must not be regulated by Article 103 of the Charter of the UN; secondly, the treaties in question must relate to 'the same subject-matter'.

It must be seen whether the hierarchical order created by Article 103 of the Charter applies to the 1966 Covenant as well as to the Charter itself, because the Covenant embodies the rules on the 'universal respect for, and observance of, human rights and fundamental freedoms for all', which the organization and its members must promote and endeavour to achieve.⁸⁶ It

Magiera, 'Direct Broadcasting by Satellite and a New International Information Order', *German Yearbook of International Law*, 24(1981), pp. 288-305 at pp. 300 ff.; Fawcett, *Outer Space* (1984), pp. 65-77.

⁸³ The General Assembly of the UN adopted a resolution on direct broadcasting by satellite (Res. 37/92 of 10 December 1982), presumably sanctioning the prior consent principle without referring to it in so many words. This resolution was adopted with 107 votes in favour, 13 against and thirteen abstentions. So there appears to be no unanimity (A/37/51, pp. 98-9 (1983)).

⁸⁴ *Lac Lanoux* arbitration, *France v. Spain*, award of 16 November 1957, *Reports of International Arbitral Awards*, vol. 12, pp. 281 ff.; English text in 24 ILR 101 at 128. The Tribunal continued: 'That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the existence of their competence to the conclusion of such an agreement' (ibid.).

⁸⁵ The following is of course not at all intended to be a treatment of the international regulation of broadcasting or of the international protection of human rights and fundamental freedoms. One of the reasons for choosing this example is that it can be reduced to relative simplicity. If a *cause célèbre* were chosen, such as for instance the complex relations among successive international instruments on the Danube, ranging from 1856 to 1977 (cf. Bastid, op. cit. above (n. 14), p. 166), the essay would serve the example instead of the other way around.

⁸⁶ See Articles 1(3), 55 and 56 of the UN Charter. The Preamble of the Covenant refers twice to the principles contained therein.

may be argued, then, that obligations imposed by the Covenant upon the States parties to it are to be regarded as obligations under the UN Charter in the sense of Article 103. The question whether Article 19(2) of the Covenant or the principle of prior consent embodied in the Radio Regulations would prevail would then be settled in favour of the former. (But then there would be no need to look at the remainder of Article 30. The question of rank will be returned to below, in sub-section 5.⁸⁷)

The requirement that the instruments must relate to the same subject-matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice. If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test of sameness is satisfied. There is little doubt that the effect of Article 428 A would be the abrogation of Article 19 (2) as regards satellite broadcasting. In the 1969 Vienna Conference the meaning of the words 'relating to the same subject-matter' was discussed by the representatives of the UK and the Expert Consultant. The former stated that these words 'should be construed strictly'.⁸⁸ The latter agreed with him, saying

that those words should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty; in such cases the question involved such principles as *generalia specialibus non derogant*.⁸⁹

Could it be said that as regards broadcasting by a satellite the Radio Regulations take precedence over the Covenant as *lex specialis*, so that the time factor is immaterial? The argument would then be that Article 19(2) is a general provision that was not intended to deal with satellite broadcasting, whereas the prior consent rule has been elaborated especially for the regulation of that type of broadcasting. It is submitted that the broad language of Article 19(2) stands in the way of such reasoning: 'impart information and ideas of all kinds, regardless of frontiers, . . . through any . . . media of [one's] choice'. It was deliberately framed in sweeping terms so as to rule out such reasoning. The provision specifies in its third paragraph the restrictions to which the enjoyment of the rights may be subjected; the prior consent of the governments of third States to the inevitable spill-over of direct broadcasting by satellites is not one of them.⁹⁰ It is not proper to apply a principle such as *generalia specialibus non derogant* if the *generalia* in one instrument are so phrased as to rule out any *specialia* in another instrument.

If the preliminary requirements of the first paragraph of Article 30 do

⁸⁷ Below, p. 106.

⁸⁸ *Official Records*, vol. 2, p. 222 (Sinclair).

⁸⁹ *Ibid.*, p. 253.

⁹⁰ Paragraph 3 mentions respect for the rights or reputations of others, and the protection of national security or of public order (*ordre public*), or of public health or morals.

not, *ex hypothesi*, preclude the applicability of the remaining paragraphs, the problem at hand may serve as an illustration of their effects (excepting, of course, paragraph 2). As the ITU has 157 members,⁹¹ the Radio Regulations are binding for almost all States. Therefore it is most likely that all the parties to the UN Covenant—numbering 83 on 31 December 1984⁹²—are bound by these Regulations. On the basis of that assumption paragraph 3 might apply, but it must then be seen which of the two treaties is the earlier one, and which the later.

The ITU Radio Regulations entered into force on 1 January 1982; for States that have or will become parties to the Covenant after that date, the Covenant is or will be the later treaty. But then again, the Radio Regulations are subject to regular revisions, and they are adopted and become binding again on member States in the revised form. The regular conclusion of revised Regulations means that in the end the Regulations will always become the later treaty *vis-à-vis* every other treaty that is not likewise regularly revised, such as the Covenant on Civil and Political Rights. This is a particularity of the Radio Regulations. Regular revision is also provided for in other treaties, especially in treaties on technical matters, but normally it is the revising or amending agreement that is 'concluded' (cf. Article 40(4) and (5) of the Vienna Convention); the original instrument itself is not concluded again in revised or amended form and thus the date of the original instrument remains the same after the revision or amendment. The example shows that it is immaterial at what date a treaty was adopted except for giving it a date; or at what date it entered into force, except for the States that had expressed their consent to be bound before that date. In many cases the relevant dates are those at which a treaty came into force for a particular State. Paragraphs 2 and 3 of Article 24 of the Vienna Convention show that entry into force does not necessarily occur at the same time for all the parties. For eleven of the States parties to the Covenant this is the later treaty, as they became parties to it after 1 January 1982.

Paradoxically, as a result of the *lex posterior* rule laid down in paragraph 3 of Article 30, a treaty to which a State was quick to become a party will be set aside by an incompatible treaty to which it became a party at a later date, perhaps reluctantly. For States that were slow in adhering to a treaty the effect of paragraph 3 will be that this treaty will supersede an incompatible treaty they were quick to enter into at an earlier date. The dates of adoption (or opening for signature) or of entry into force of a treaty are of limited relevance in this connection, and the relevance of Article 30 is limited accordingly.

Thus if State A became a party to the Covenant in 1978, and the Radio Regulations became operative for it in 1982, the latter prevail, whereas for neighbouring State B, which acceded to the Covenant in 1984, these

⁹¹ See Noll, *loc. cit.* above (n. 80), at p. 179.

⁹² *Multilateral Treaties deposited with the Secretary-General* (above, n. 10), p. 124.

Regulations are superseded by the Covenant. It is important to point out here that 'A' and 'B' may also stand for groups of two or more States. What if State B should grant a broadcasting licence without having made a previous agreement with neighbouring State A? A might protest, and point to B's obligations under the Radio Regulations; but B will probably reject the protest, relying on the *lex posterior* rule of paragraph 3.⁹³ State A may seek a settlement of the dispute through the machinery for the settlement of disputes set up by the ITU.⁹⁴

What if, in its turn, State A refuses to grant a broadcasting licence to a broadcasting entity, invoking the fact that the previous agreements with neighbouring States (such as State B), which are required by the Regulations, have not been made so far? If Article 41 of the Covenant applies, State B may bring a complaint before the Human Rights Committee against State A for an infringement of its obligations under Article 19(2) of the Covenant. If the Optional Protocol to the Covenant is operative for State A, the broadcasting organization itself might bring such a complaint before the Committee. State A will in both cases invoke paragraph 3, and plead that the Radio Regulations are the later treaty as far as it is concerned, and that this consequently prevails over the Covenant.

The above clearly confirms the view that Article 30(3) is based on a wrong presumption, namely, that 'earlier' would always refer to one and the same treaty for all States involved in a particular case, and that, likewise, this would be the same for 'later': that only one treaty would be the 'later' one for the States involved. But this is not at all necessarily the case: a treaty can be the 'earlier' one for one State (or for two or more States) and the 'later' one for another State (or for two or more other States). And the same may hold for a 'later' treaty: it can be the 'later' one for one State, while for another State it can be the 'earlier' one. In cases where this is so, the provision is incapable of regulating the conflict of obligations that occurs. This is what was meant above where it was observed that Article 30 does not establish a common regime for the States involved.

Paragraph 4 of Article 30 was assumed not to be applicable to the case discussed here because of the near universal membership of the ITU: all the parties to the Covenant are presumably bound by the 1979 Regulations. But suppose, for the sake of argument, that some members of ITU have not complied with Article 42(3) of the International Telecommunication Convention,⁹⁵ and are not so bound. Sub-paragraph 4(a) does not need comment as the rule contained in it is the same as that in paragraph 3; it only operates on a smaller scale. The legal effect of sub-paragraph 4(b) is

⁹³ The assumption is that in this example both States are parties to the Vienna Convention on the Law of Treaties.

⁹⁴ Article 28 of the International Telecommunication Convention provides for arbitration of disputes among ITU members; the settlement of disputes is further elaborated in Annex 3 to this Convention.

⁹⁵ 'Members shall inform the Secretary-General of their approval of any revision of these Regulations by competent administrative conferences . . . '.

different: it naturally depends on which of the two instruments that are involved actually applies. Only one—common—instrument is operative, so the time factor has no significance.

If, for example, State A is bound by the Covenant but not by the Regulations, while State B is bound by the Covenant as well as by the Regulations, the Covenant applies as between States A and B, and not the Regulations. (By the same token, if State A is bound both by the Regulations and the Covenant, while State B is bound by the Regulations but not by the Covenant, then the Regulations apply as between the two States, or groups of States, as observed above.) The dates on which the prevailing instrument was adhered to are immaterial under sub-paragraph 4(b), as only one treaty applies and not 'successive' treaties. So also an 'earlier' treaty can control if it is the common regime.

4. *Paragraph 5 of Article 30; State responsibility*

In the case referred to above only one treaty is applicable, but this must not obscure the fact that another treaty is involved, and (other) States parties to that treaty. If the example just mentioned may be used once more, for B the Covenant applies in its relation to A in pursuance to paragraph 4(b), but compliance by B with the Covenant leads to a violation by B of the other treaty, *in casu* the Regulations. As a result, paragraph 5 of Article 30 comes into play. It is worthy of note that this paragraph does not refer—whether deliberately or not—to an 'earlier' or 'later' treaty any more, but that it mentions simply 'a treaty' and 'another treaty'. Moreover, it speaks in a concrete manner of 'obligations' under a treaty. It is submitted that the absence of a reference to the time of a treaty with respect to another treaty is in accordance with the realities of multilateral treaty-making through complex procedures. Paragraph 5 does not offer any solution to the conflict of obligations a State may incur; it confines itself to an implied reference to the international legal rules on State responsibility. Schwarzenberger surely would not find fault with this: 'If a legal system leaves a party to conflicting transactions to extricate itself as well as it can from its embarrassing situation and does not perform this task for it, this is not necessarily a deficiency of the legal system in question'.⁹⁶ But it remains to be seen whether this is true.

At what moment in time does the conflict between treaty obligations arise so as to activate the rules concerning the international responsibility of the State that has incurred incompatible obligations? Paragraph 5 speaks not only of the 'application' of incompatible treaty provisions, but also of 'the conclusion . . . of a treaty' containing provisions which are incompatible with those of another treaty. The answer to this question can be sought in the law of treaties, e.g. in Article 60 of the Vienna Convention on material

⁹⁶ Schwarzenberger, *op. cit.* above (n. 15), p. 482.

breach of a treaty.⁹⁷ After all, the act constituting the breach can consist of the 'conclusion or application' of another treaty,⁹⁸ as it is formulated in Article 30(5). The answer will finally have to be sought in the rules of State responsibility, which are 'concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act', as it is said in Special Rapporteur Riphagen's preliminary report for the ILC.⁹⁹ So it must be determined what is the 'act' that entails international responsibility. But if the act in question is the 'conclusion' of a treaty, the matter will most likely be referred back to the law of treaties: as Special Rapporteur Riphagen observed elsewhere, the distinction between the law of treaties and the law of State responsibility is not 'watertight'.¹⁰⁰ It has appeared, however, that no unequivocal answer can be given in the law of treaties to the question *when* responsibility is incurred as a result of the 'conclusion' of a treaty. When consent to be bound by this treaty is expressed? At its entry into force? When it is applied for the first time?

As regards the referral to the law of State responsibility of questions arising from the conclusion of incompatible treaties, it must be recalled that in the ILC the Special Rapporteur has submitted as draft Article 16 of Part II of the draft articles on State responsibility a provision which reads in part as follows:

The provisions of the present articles shall not prejudice any question that may arise in regard to: (a) the invalidity, termination and suspension of the operation of treaties . . .¹⁰¹

As the effect of Article 30 might be the suspension of the operation of one of the conflicting treaties (if not its invalidity or termination), this saving clause may be unfortunate from the point of view of Article 30. Combined with the referral in Article 30(5) it might create a gap in the codified law, the undesirable effect of which needs no demonstration. In draft Article 5 of the same set of draft articles it is provided that the State committing the

⁹⁷ See *ICJ Reports*, 1971, p. 47, para. 94 (advisory opinion on *Namibia*): Article 60 'may in many respects be considered as a codification of existing customary law . . .'. But see Simma, below, n. 102 and text thereby.

⁹⁸ See Rosenne, *Breach of Treaty* (1985), pp. 85-95: 'Conclusion of a Treaty in Violation of an Earlier Treaty'.

⁹⁹ *Yearbook of the ILC*, 1980, vol. 2, pt. 1, p. 109. On State responsibility see Brownlie, *System of the Law of Nations, State Responsibility*, Part I (1983); ch. XII deals with temporal aspects. It is submitted that the rules laid down in Articles 24, 25 and 26 of Part I of the ILC draft on State responsibility are not especially helpful for determining the time of the wrongful act in a case where the act is the 'conclusion' of a treaty.

¹⁰⁰ 'State Responsibility: New Theories of Obligation in Interstate Relations', in Macdonald and Johnston (eds.), *The Structure and Process of International Law* (1983), pp. 591 ff. See, on Article 60, pp. 600 ff.

¹⁰¹ *Yearbook of the ILC*, 1985, vol. 2 pp. 3 ff. at p. 15, with Commentary. See Pisillo Mazzeschi, 'Termination and Suspension of Treaties for Breach in the ILC Works on State Responsibility', in Spinetti and Simma (eds.), *United Nations Codification of State Responsibility* (1987), pp. 57-95 at pp. 78 ff., 92 ff.

wrongful act shall 'discontinue the act', a prescription which is relevant within the context of Article 30. This matter certainly merits a full consideration by the ILC. Professor Simma observed, with respect to Article 60 of the Vienna Convention, that it constitutes

one of the provisions with regard to which . . . the limited scope of [the Convention] will be felt both clearly and painfully. While Article 60 and its related provisions carefully and equitably regulate the application of the reactions to breach having their *sedes materiae* in the law of treaties, any examination of the breach situation limited to an analysis of the rules of the Vienna Convention will, due to the exclusion of similar reactions having their *sedes materiae* in the law of international responsibility, provide the observer with an incomplete picture.¹⁰²

The situation under Article 30 is different from that under Article 60 as there is an implied reference to the law of responsibility in paragraph 5. But Simma's observation holds true for Article 30 otherwise as far as it concerns the breach of a treaty through the application of another treaty. As the thrust of Article 30, no less than that of Article 60, is 'really to preserve the breached treaty if possible',¹⁰³ here too there clearly arises the question of 'a form of new legal relationships' resulting from internationally wrongful acts of a State,¹⁰⁴ *in casu* created by the non-fulfilment of a treaty obligation because another, incompatible, obligation has been given precedence by a State.

In the law of treaties, it must first of all be seen whether one of two or more conflicting treaties contains a provision specifying their relationship: a provision of the kind referred to in paragraph 2 of Article 30, or such as Articles 232 to 234 of the EEC treaty or Article 311 of the UN Convention on the Law of the Sea, among others.¹⁰⁵ If such a clause is applicable, the relationship between the treaties can be determined on the basis of some hierarchical order. In paragraphs 1 and 2 of Article 30, the effect of such a hierarchical order is specified; as a result, no question of responsibility will arise. The remaining paragraphs of Article 30 concern situations where no such order obtains in so far as no clauses as mentioned here are operative.

It is helpful to make another distinction in this connection, not between abstract rules and concrete rights and obligations, but between abstract conflicts between treaties and concrete conflicts between treaty rights and obligations. To mention again the two earlier examples: on the one hand the advisory opinion of the Permanent Court on the question of the compatibility of the contemplated *Austro-German Customs Union* with Article 88

¹⁰² 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law', *Österreichische Zeitschrift für Öffentliches Recht*, 20(1970), p. 5 at p. 83; see also Rosenne, *op. cit.* above (n. 98), p. 7.

¹⁰³ Rosenne, *ibid.*, p. 75, writing about Article 60. Thus also Riphagen, *loc. cit.* above (n. 100), p. 601: 'Article 60 taken as a whole typically tries to save the treaty régime from in fact completely breaking down as a result of a breach'.

¹⁰⁴ Cf. the preliminary report by ILC Special Rapporteur Riphagen, *Yearbook of the ILC*, 1980, vol. 2, pt. 1, p. 112 (*inter alia* para. 28).

¹⁰⁵ See, e.g., Blix and Emerson, *The Treaty Maker's Handbook* (1973), section 15.

of the Treaty of St Germain and Protocol I of 4 October 1922¹⁰⁶ concerned what was then still a potential conflict. Can the contested instrument, the Protocol of Vienna of March 1931, be said to have been 'concluded'? The Protocol was an agreement to establish the Union, rather than itself a definite, operative arrangement, but it can still be regarded as a treaty. It was 'concluded' by an exchange of notes on 19 March 1931, in which the Austrian and German Ministers of Foreign Affairs declared that they had agreed upon the Protocol ('*zugestimmt*').¹⁰⁷ The Protocol was treated both by the majority and by the dissenting Judges in the Court as a treaty. But as yet no question of responsibility could possibly arise as a result of the 'conclusion'. At the other end of the scale a situation like that in the *Oscar Chinn* case may be mentioned, in which the 'other' treaty was in fact applied, so that the conflict was quite real.¹⁰⁸

The word 'concluded' in Article 30 paragraph 5 can be understood to refer to the other treaty in all possible phases of treaty-making, from its adoption to its having entered into force. After the adoption of the other treaty the conflict is as yet an abstract one. After the other treaty has become operative the conflict is concrete and international responsibility may be incurred. The words 'or application' can be understood as an expression of this.

5. *The question of the rank of treaties*

It is beyond the scope of this article to speculate how, for instance, the Human Rights Committee or an ITU tribunal would deal with the obligations of State B in the conflict that served as an example in the discussion of Article 30, above. But if this provision were to be applied by an international tribunal called upon to decide such a conflict of obligations, that tribunal might read Article 30 as dealing not with treaties, but with obligations, and it would then be faced with a rigid prescription to let the obligation that was the most recently incurred by the State in question prevail. Owing to the particularities of multilateral treaty-making through complex procedures this might in some cases lead to results the tribunal would feel to be unfortunate. The escape from this prescription would then be to consider the conditions for the application of Article 30 as not fulfilled: the obligations are not of equal rank, or do not relate to the same subject-matter, or both.

The more the time element appears inconclusive for the operation of Article 30, the more the factor of the rank of treaties will gain in importance. So it is appropriate to come back to the question of rank. This question can also come into play without Article 103 of the UN Charter directly applying, or in the absence of any other clause establishing a specific order between treaties. It is possible that a treaty is to be regarded as super-

¹⁰⁶ *PCIJ*, Series A/B, No. 41 (5 September 1931).

¹⁰⁷ Texts of Notes and Protocol: *ibid.*, at pp. 93 ff.

¹⁰⁸ Cf. *PCIJ*, Series A/B, No. 63 (12 December 1934).

ior on another basis, and that consequently an agreement which is at variance with it is to be seen as a violation of it. The following *dictum* by the ICJ is not limited to the rank that must be accorded to the Genocide Convention, but is of general application:

It is . . . a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by use of . . . particular agreements, the purpose and *raison d'être* of the convention.¹⁰⁹

The rules laid down in Article 30 do not exclude a differentiation between treaties according to rank. The wording of the first paragraph of Article 30 does not exclude this, nor does that of paragraph 5. Paragraph 5 merely speaks of 'responsibility', and it does not specify whether it results from non-compliance with a treaty obligation incurred later *or earlier*. The observations of the Special Rapporteur in his sixth report and the ILC commentary on the provision¹¹⁰ also indicate that the drafters of Article 30(5) did take account of the possibility that a prevailing treaty obligation might originate from a treaty that had been 'concluded' earlier, not later, than another treaty, without the 'earlier' treaty containing a clause to that effect. In such a case the time factor plays no role. The ILC first pointed out that it wanted 'to avoid any risk of paragraph 4(c) being interpreted as sanctioning the conclusion of a treaty incompatible with obligations undertaken towards another State under another treaty'.¹¹¹ It observed further:

Some obligations contained in treaties are in the nature of things intended to apply generally to all the parties all the time. An obvious example is the nuclear Test-Ban Treaty, and a subsequent agreement entered into by any individual party contracting out of its obligations under that Treaty would manifestly be incompatible with the Treaty.

But the Commission did not include a special rule in Article 30, noting in its commentary that 'under the existing law the question appeared to be left as a matter of international responsibility'. It went on to discuss in this connection a type of treaty obligations that it called—following Special Rapporteur Fitzmaurice—'integral' obligations. Sir Gerald Fitzmaurice had defined a treaty containing 'integral' obligations as one where 'the force of the obligation is self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others'. (By way of illustration of this type of treaty Fitzmaurice observed in his second report: 'Thus, a fundamental breach by one party of a treaty on human rights could neither justify termination of the treaty, nor corresponding breaches of the treaty . . .'.)¹¹² The Commission commented that such 'integral'

¹⁰⁹ *ICJ Reports*, 1951, p. 21 (*Reservations to the Genocide Convention*).

¹¹⁰ *Yearbook of the ILC*, 1966, vol. 2, pp. 76, 214–17, respectively. See also the discussion in the 1964 *Yearbook*, vol. 2, pp. 185–92, especially pp. 189–91.

¹¹¹ *Ibid.*, 1966, vol. 2, p. 214.

¹¹² *Ibid.*, 1957, vol. 2, p. 54.

obligations may vary widely in importance: some may deal with essentially technical matters; others, however, 'may deal with vital matters, such as the maintenance of peace, nuclear tests or human rights'. Still, the Commission felt that it should 'leave the question as one of international responsibility'.¹¹³ At any rate, it did not deal with incompatible obligations in terms of voidness *pro tanto* of the conflicting treaty, or lack of capacity of the parties to conclude it.

The repeated reference to the special position of treaties on 'human rights' suggests that the rules of Article 30 may not apply in our example, as these rules are based on the presumption that the treaties involved are of the same rank. If they are not,¹¹⁴ then, as previously stated, the question of the time of the conclusion of treaties in Article 30 is of no significance.

VI. ARTICLE 30 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS, 1986¹¹⁵

The second Vienna Convention on the Law of Treaties is framed as a close copy of the first, differing from it only if its application to treaties of international organizations requires a different rule. This explains the purely textual differences between Article 30 of the 1969 Convention and the corresponding Article 30 of the new instrument.

One major difference results from the fact that the ILC could not solve the question of the reference to Article 103 of the Charter in paragraph 1 of Article 30: could Article 103 be considered as binding international organizations along with States, or not? The ILC settled the matter by taking the reference out of paragraph 1 and adding a sixth paragraph to draft Article 30: 'The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations'.¹¹⁶

In the 1986 Conference, an amendment was tabled by Argentina,¹¹⁷ the

¹¹³ Ibid., 1966, vol. 2, pp. 216-17.

¹¹⁴ A well-known *dictum* by the European Commission of Human Rights claiming a special position for the European Convention on Human Rights might apply *mutatis mutandis* to the Covenant as well: '... the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order . . . [I]t follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves': Case 788/60, *Yearbook of the European Convention on Human Rights*, 4 (1961), pp. 138, 140.

¹¹⁵ Opened for signature 21 March 1986. Text in A/CONF. 129/15; reproduced in *International Legal Materials*, 25(1986), pp. 534-92.

¹¹⁶ See *Yearbook of the ILC*, 1982, vol. 2, pt. 2, p. 41. The ILC declared in its Commentary that the terms of paragraph 6 are 'deliberately ambiguous'.

¹¹⁷ A/CONF. 129/C.1/L.44, as orally revised by the US delegation.

wording of which resembles that of paragraph 6 as it stands.¹¹⁸ The intention was to make explicit in paragraph 6 that the rule of Article 103 of the Charter also applied to international organizations.¹¹⁹ It is not beyond doubt that paragraph 6 expresses that intention clearly. However, all this has no bearing on the question at what time a multilateral treaty is 'concluded' if an international organization participates in the negotiations and the drawing up of that treaty.

VII. SUMMING-UP

The foregoing first of all demonstrates that the Convention has expanded the range of meanings of the term 'conclusion' far beyond what the term means in the customary law of treaties, even though in customary law it is not a term of art either. It is fair to say that in customary law 'conclusion' refers either to the moment an agreement on a text is reached or to the moment a treaty becomes binding upon the parties. In the latter sense there may be more than one moment, of course. Also, the moments of the former and the latter 'conclusion' can coincide.

In the Convention, 'conclusion' can mean any act performed in the process of multilateral treaty-making, ranging from the moment in time when the text of the treaty is adopted to the point where the treaty has entered into force. Still, it is not likely that the interpretation of the various Convention provisions on this point will present any difficulties, except perhaps in the cases of Articles 4 and 52.

The operation of Article 59 is restricted in practice by the requirement that all the parties to one treaty are also parties to the other treaty. Presumably Article 59 will function best with respect to treaties concluded among States that form relatively small, coherent groups, or treaties that regulate matters of a technical nature which do not allow for diverging practices among participating States. The ambiguities that lurk in the words 'earlier' and 'later' are optimally avoided by stipulating that the later treaty enters into force for all States concerned at the same time.¹²⁰ Another restriction upon the applicability of Article 59 results from the condition that the later treaty must expressly specify that the parties to it intended it to govern the matter, abrogating the earlier one, or that this intention is otherwise established. It must moreover be established that *all* parties had that intention.¹²¹ If these conditions are not met, Article 30 governs the treaty relationships.

¹¹⁸ Article 30(6) of the 1986 Convention is as follows: 'The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail.'

¹¹⁹ A/CONF. 129/C.1/SR 15, p. 3.

¹²⁰ See above, n. 62.

¹²¹ As Sinclair points out, in the system of the Convention there is no place for an agreement of some parties to a multilateral treaty to *terminate* that treaty *inter se* (op. cit. above (n. 51), p. 185).

It appears that Article 30 is based on suppositions that are too simple as regards the time factor in multilateral treaty-making processes. The provision is not satisfactory because it does not take sufficiently into account the difference between a treaty and treaty obligations, between the time of the treaty and the time of the treaty obligations. A multilateral treaty can be given a date, and it is in fact given a date. Usually this is the day on which its text was adopted or it was opened for signature. There will also be a date on which it entered or enters into force, albeit usually only for a number of the States that ultimately constitute its parties. These dates have no direct relationship to the dates on which States parties to that treaty actually incur obligations or acquire rights under it. These dates can be determined but do not necessarily correspond in time with the relevant dates of the treaty itself.

Since the regulation of Article 30 is predominantly based on 'successive treaties', it does not solve questions of conflicts between earlier or later rights or obligations of States under different treaties. Special Rapporteur Fitzmaurice observed in his third report:

. . . [W]hat the conflict *is*, is not so much a conflict between two *treaties*, but . . . a conflict between two sets of *obligations* of certain of the parties . . . ¹²²

In so far as the rules contained in Article 30 approach the conflict as one between treaties, based on the time of treaties, they cannot solve conflicts between concrete treaty rights and obligations. These have their own time, which is not necessarily related to the times of the treaties involved.

In paragraph 5, however, there is no mention of time, or of treaties, but of obligations under a treaty and of those under another treaty. In implied terms the conflict is referred to the law of State responsibility. This referral does not, by itself, afford a solution to the conflict. Besides, the infringement of a treaty as a result of compliance with another treaty is usually regarded as a matter of the law of treaties rather than as one of State responsibility. At least it does not appear that in the latter field any specific rules on the legal consequences of this type of wrongful act have been developed. According to the eighth preambular paragraph of the Convention the question pertains to customary international law: it is not 'regulated' by the provisions of the Convention, unless, of course, the effect of a conflict between treaty obligations is such that it amounts to a material breach of a treaty, in which case Article 60 applies.

The reference to Article 103 of the UN Charter in Article 30 (1) remains of prime importance in this connection, as it suggests the principle of higher rank where that of priority in time appears to be ineffective, save in exceptional cases. In so far as in the customary law of treaties more, and more specific, rules or principles on the conflict of treaty obligations have been developed than in the law of State responsibility, the implicit refer-

¹²² *Yearbook of the ILC*, 1958, vol. 2, p. 39 (emphasis in the original).

ence in Article 30 (5) to the rules of State responsibility is not to be regarded as a felicitous one. But then again, authoritative observers point out that when a conflict between treaty obligations occurs, the solution to be found will not be of a legal but of a political nature: the State in question has brought itself into the embarrassing situation where it has no other option than to breach either this treaty or that, and to come to some sort of arrangement with the injured State.¹²³ As stated by Wolfram Karl, 'conflicting obligations . . . subsist in international law; they can only be resolved on the political level, by fresh negotiations or by a *fait accompli*'.¹²⁴

It is regrettable to find that Article 30 of the Convention cannot improve the international legal situation as it appears to stand. Simma concluded his study on Article 60 as follows: 'It is to be wished . . . that the International Law Commission, in its work on the topic of State responsibility, will eliminate all possible sources of misconceptions as to the interrelation between rules governing that matter and the law of treaties'.¹²⁵ There are obvious reasons for reiterating that wish here.

¹²³ Fitzmaurice, *ibid.*, p. 42; De Visscher, *Theory and Reality in Public International Law* (2nd edn., Corbett transl., 1968), p. 271.

¹²⁴ Karl, *loc. cit.* above (n. 69), p. 473.

¹²⁵ Simma, *loc. cit.* above (n. 102), at p. 83; see also above, text at nn. 101, 102.

BOYCOTT AND THE LAW OF NATIONS: ECONOMIC WARFARE AND MODERN INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE*

By STEPHEN C. NEFF†

If I, improperly and without good reason, refuse to sell you what you have need of at a fair price, I violate my duty; you may make complaint, but you must put up with it, and you can not undertake to force me without attacking my natural liberty and doing me an injury.¹

—Emmerich de Vattel (1758)

I. INTRODUCTION

IT may be wondered whether this statement by Vattel remains an accurate reflection of the law of nations. On its face, it would appear to hold that the law countenances an unrestricted right on the part of States to refuse to have any economic relations with other States, or to disrupt existing ties, on purely political grounds. Furthermore, it would appear, on the strength of the recent case of *Nicaragua v. United States* in 1986, that the International Court of Justice substantially endorses Vattel's conclusion. In a brief discussion of the legality of a total trade boycott which the US imposed against Nicaragua in 1985, the Court concluded that, as a matter of general customary international law, the US action could not be condemned. 'A State', it held, 'is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific obligation . . .'.² (It so happened that, in that particular case, there was such a treaty obligation on the part of the US and that the Court accordingly held the boycott unlawful on that ground.)

And yet there is considerable evidence that the true position on the question of the legality of economic warfare under customary international law is rather less categorical than this brief statement by the Court would lead one to believe. For one thing, there is a certain natural, and commendable,

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¹ Vattel, *The Law of Nations, or the Principles of Natural Law* (trans. Fenwick, 1916; 1st edn., London, 1758), pp. 40–1.

² *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *ICJ Reports*, 1986, p. 14 at p. 138, para. 276 (hereinafter cited as *Nicaragua v. US*).

hesitation on the part of modern international lawyers to accept that any form of patently hostile conduct (economic or otherwise) directed by one State against another could be wholly and completely lawful.³ This hesitation is most apparent in the case of the Arab boycott of Israel, which has been in continuous (though less than rigorous) existence since the late 1940s. Its defenders tend to justify its legality not on the basis that boycotting is lawful *per se*, but rather on more narrow and specific grounds such as self-defence, the exercising of belligerents' rights, the promotion of the human rights of the Palestinian people and so forth.⁴

More generally, there is substantial evidence, as the discussion below will indicate, that all three of the major blocs of States—the Western, the socialist and the Third-World countries—regard the waging of economic warfare on political grounds as unlawful. They base their conclusions, however, on rather different grounds. The discussion below will trace the evolution of the positions of these three groups on this subject. The concluding section will then discuss the possibility of reconciling these differing views and, in the process, will point out the broader significance that the conundrum of economic warfare holds for the development of modern international law generally.

At the slight risk of anticipating these conclusions, it may be noted briefly at the outset that the remarks which the International Court made on the subject of boycotting in the *Nicaragua v. United States* case were made in what might be termed a narrowly political context. It should be borne in mind that, throughout the judgment, the Court was considering allegations of the violation by the US of various legal rights designed to safeguard the sovereignty and independence of Nicaragua. The US was found, for example, to have engaged in the use of force against Nicaragua and to have intervened in its domestic affairs contrary to the rules of customary international law. Viewed from that perspective, the Court's conclusion that the boycott did not violate customary international law may be accepted. That is only to say, however, that the boycott did not amount to an infringement of Nicaragua's independence or to an intervention into its

³ This hesitation is most clearly apparent in the reluctance of writers to hold that economic warfare is permissible in *all* circumstances. Those who contend that economic warfare is, in principle, not illegal have little difficulty in finding at least some exceptions to this conclusion. For a particularly striking example, see Farer, 'Political and Economic Coercion in Contemporary International Law', *American Journal of International Law*, 79(1985), p. 405. Other examples include Kausch, 'Boycott', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3(1982), p. 74; and Oliver, 'Legal Remedies and Sanctions', in Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983), p. 61 at pp. 76–8. See also the authors cited in n. 116, below.

⁴ See, for example, Hassouna, *The League of Arab States and Regional Disputes: A Study of Middle East Conflicts* (1975), pp. 317–18; and Iskander, *The Arab Boycott of Israel* (1966), pp. 14–21. Even the Commissioner-General of the Central Boycott Office of the League of Arab States has given self-defence as the justification for the boycott: 'Statement on the Arab Boycott', 5 March 1975, in Mersky (ed.), *Conference on Transnational Economic Boycotts and Coercion, February 19–20, 1976, University of Texas Law School: Material on the Arab Oil-Producing Nations Boycott* (1978), vol. 2, p. 114. See also the text at n. 42, below.

domestic affairs.⁵ The Court did not consider the broader question of whether a different set of rules might not apply to *economic* relations between States from those which apply to the *political* relations with which it was clearly concerned in the case. The discussion below will be directed towards the views of the three principal groups of States on that crucial issue.

A final introductory word is necessary on the definition of 'economic warfare' and related terms. In this discussion 'economic warfare' means simply the inflicting of economic injury by one State (or group of States) upon another in the course of a political dispute. (Matters of a wholly economic nature, such as trade disputes over agricultural subsidies and the like, are therefore excluded from consideration here.) The methods of economic warfare are various. The most obvious is boycotting, i.e., the blanket refusal to have or permit economic dealings of any kind with the target country or countries.⁶ An embargo is another device of economic warfare, i.e., a refusal to export to the target State or States.⁷ (An embargo is therefore, so to speak, one half of a boycott, because it does not entail a refusal to import goods *from* the target country, as a boycott does.) Other possible techniques include the withdrawal of most-favoured-nation (MFN) status from trading partners, the reduction of foreign aid, the nationalizing of foreign-owned property on political grounds, the freezing of foreign-owned assets and the withdrawal of rights in maritime zones.⁸ The term 'economic coercion' has frequently been employed for conduct of this kind,⁹ although it would seem to be somewhat narrower in scope than 'economic warfare'. The reason is that some hostile economic measures are not designed so much to induce changes of policy on the part of the target States, as the

⁵ The Court stated that, for a violation of the duty of non-intervention to take place, there must be a coercive act on the part of the intervening State bearing on matters which fall within the sovereign rights of the victim State: *Nicaragua v. US*, loc. cit. above (n. 2), at pp. 107-8, para. 205. Since the Court considered this question in some detail in the judgment, without giving any indication that the US trade boycott fell into this category, it would appear safe to conclude that the boycott did not violate the principle of non-intervention.

⁶ Kausch, loc. cit. above (n. 3).

⁷ Kausch, 'Embargo', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 8 (1985), p. 169. On the subject of embargoes, see generally Lindemeyer, *Schiffsembargo und Handelsembargo: Völkerrechtliche Praxis und Zulässigkeit* (1975).

⁸ On various aspects of the waging of economic warfare for political purposes, see generally Baldwin, *Economic Statecraft* (1985); Daoudi and Dajani, *Economic Sanctions: Ideals and Experience* (1983); Daoudi and Dajani, *Economic Diplomacy: Embargo Leverage and World Politics* (1985); Hirschman, *National Power and the Structure of Foreign Trade* (1945); Knorr, *Power and Wealth: The Political Economy of International Power* (1973); id., *The Power of Nations: The Political Economy of International Relations* (1975); Leyton-Brown (ed.), *The Utility of International Economic Sanctions* (1987); Nincic and Wallenstein (eds.), *Dilemmas of Economic Coercion: Sanctions in World Politics* (1983); and Wu, *Economic Warfare* (1952). For an encyclopedic collection of information about various instances of economic warfare throughout history, see Hufbauer and Schott, *Economic Sanctions Reconsidered: History and Current Policy* (1985). On the US experience in this area, see Ellings, *Embargoes and World Power: Lessons from American Foreign Policy* (1985).

⁹ See, for example, Lillich (ed.), *Economic Coercion and the New International Economic Order* (1976); and Dicke, 'Economic Coercion', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 8 (1985), p. 147.

term 'coercion' might imply, as simply to inflict injury. For that reason, the more general expression 'economic warfare' seems preferable.

II. THE WESTERN POSITION: FROM 'SOLIDARITY' TO NON-DISCRIMINATION

The conceptual foundations of international law were set forth in essentially their modern form in the eighteenth century. It was then that the intellectual cornerstone of the discipline—the principle of the sovereign equality of States—was laid. The key figure here was the German scholar Christian Wolff who, in his treatise on *The Law of Nations treated according to a Scientific Method* of 1749, set international law upon a distinctively positivist course by firmly identifying the nation-State as the fundamental unit of the law of nations (as it now was in the truest sense of that term).¹⁰ It was the nature of the State which, in Wolff's eyes, determined the form and content of the law of nations. To be precise, the crucial attributes of sovereignty and independence of the individual State meant that international law could have no other source than the will of the nations themselves.¹¹ Furthermore, Wolff made a sharp and clear distinction between duties which a nation owed to itself, on the one hand, and duties which it owed to other nations, on the other, forthrightly holding that the former took precedence over the latter.¹² The most vital duty for a State, on this view, was to attain 'perfection', i.e., to realize, in as full a measure as possible, its own purpose and destiny.¹³

The implications of these views in the field of economic relations were clear enough. Since it was the duty of each State to strive for its own 'perfection', and since States were legally equal to and independent of one another, it followed naturally that each State was at liberty to decide for itself whether it would or would not trade with others.¹⁴ China, for example, was an illustration of a State which chose not to engage in foreign commerce. Wolff expressly defended the legality (if not the wisdom) of this decision.¹⁵ The views of Vattel in this area were substantially a repetition and popularization of those of Wolff.¹⁶

¹⁰ On the very first page of his treatise, Wolff stated his purpose to be 'to show . . . how nations as such ought to determine their actions, and consequently to what each nation is bound . . . and what laws of nations arise therefrom . . .': *The Law of Nations treated according to a Scientific Method* (trans. Drake, 1934; 1st edn., Halle, 1749), p. 9.

¹¹ *Ibid.*, at p. 19.

¹² *Ibid.*, at p. 107.

¹³ *Ibid.*, at pp. 24–37.

¹⁴ '[C]ommerce between nations', Wolff held, 'is . . . naturally, a right of pure power, consequently acts pertaining to it are acts of pure will': *ibid.*, at p. 45. Similarly, he held that 'it depends upon the will of any nation whether it desires to engage in commerce with another nation or not . . .': *ibid.*, at p. 43.

¹⁵ *Ibid.*, at p. 98.

¹⁶ Vattel, *op. cit.* above (n. 1), at pp. 39–43, 121–5.

In the years after Wolff and Vattel, however, the principles which they expounded came under increasing challenge. The challenge was mounted not by international lawyers but rather by the classical liberal political economists from Adam Smith onwards. Their work laid the basis for holding that the relations between States in the sphere of economic relations was—or at least should be—fundamentally different from that set forth in the State-oriented and positivist doctrines of Wolff and Vattel. Very broadly, the theories of the liberal political economists implied the overturning of the view that a State's primary duty was to itself, rather than to the international community at large.

What the classical economists were concerned to do was to eliminate, as far as possible, all barriers to economic contact between individual persons over the entire face of the earth. Ideally, each person would be left free to pursue whatever economic activity he did the best. By the same token, each region of the earth would specialize in the production of whatever goods it could make most efficiently. Free trade was, of course, the necessary concomitant of this specialization for the sake of efficiency: a person, or area, which specialized in the production of some single good or limited range of goods necessarily would have to trade with other producers in order to obtain the full range of materials required for a satisfying life.¹⁷

This conception, when taken to its logical conclusion, clearly involved an assumption that the entire earth would ultimately become one single, integrated economic system—one gigantic transnational 'mercantile republick', in the words of Adam Smith.¹⁸ For only then could the manifold advantages of the classical liberal economic system be realised to their fullest extent. If even a single country or region declined to participate in the system (i.e., failed to liberate its inhabitants economically by allowing them to do what they 'naturally' did best), then the efficiency of the world economy as a whole would be impaired. The reason was plain enough to see. By hypothesis, the non-participating region would be producing something for which it was not naturally best suited (i.e., for which it did not have a comparative advantage, in the technical language of the liberal economists). That fact alone constituted a wasteful use of resources. Furthermore, some other region of the world would now have to divert resources from whatever it should have been producing (i.e., from the production of whatever material it had a comparative advantage in) to fill the gap left by the recalcitrant area. The conclusion was clear: a State such as China, which chose to wall itself off economically from the rest of the world, should not be seen as simply pursuing its own 'perfection', as in the view of Wolff and Vattel. It should be seen, in addition, as inflicting an injury upon the rest of the

¹⁷ On the theories of the classical liberal economists of the eighteenth and nineteenth centuries, see generally O'Brien, *The Classical Economists* (1975).

¹⁸ *An Inquiry into the Nature and Causes of the Wealth of Nations* (ed. Campbell and Skinner, 1976; 1st edn., London, 1776), p. 443.

world, by impeding the efficient functioning of the great global economic mechanism.¹⁹

From the standpoint of international law, this line of reasoning had one outstandingly important implication. It implied a complete reversal of the very nature of the rights and duties of States, as they had been laid down by Wolff and Vattel. It was no longer possible, under this system, to see the national interest, or the 'perfection', of each individual State as the basic mainspring of the law of nations. There would have to be a radical shift of emphasis from the sovereignty and independence of individual States to the promotion of a single global community in the true sense of the word. International law would have to shift its focus from a jealous guarding of the *rights* of States to be free from undue interference by other States, to a concern with the *duties* of States to take the steps necessary to bring the global 'mercantile republic' into being. In essence, it was now to be the duty of States to sweep away the myriad barriers to freedom of trade and of economic activity generally on the part of individuals. They should lower tariff barriers and other impediments to the free flow of goods, lift burdensome restrictions on foreign investment, ease restraints on the free movement of labour (i.e., adopt liberal immigration and emigration policies) and so forth. In short, States were to function as agents in the service of the well-being of mankind as a whole rather than as relentless pursuers of their own short-term interests.

One obvious conclusion of this new way of looking at international relations was that it would now be necessary for States scrupulously to refrain from causing undue disruption to the functioning of the global 'mercantile republic', since any disturbance in trading and production patterns would constitute (as observed above) an injury to the world as a whole, by reducing the efficiency of the world economic system. Failure to co-operate in the great enterprise of bringing the liberal economic vision to fruition, for whatever reason, amounted, in effect, to an act of economic warfare against the whole of mankind. As John Stuart Mill put it in 1844:

It is evidently the common interest of all nations that each of them should abstain from every measure by which the aggregate wealth of the commercial world would be diminished, although of this smaller sum total it might be enabled to attract to itself a larger share by trade restrictions. And the time will certainly come when nations in general will feel the importance of this rule, and will so direct their approbation and disapprobation as to enforce observance of it.²⁰

Nor should it be thought that the liberal political economists were by any means narrowly economic in outlook. On the contrary, many of the early classical economists, such as the French writers Jean-Baptiste Say and

¹⁹ See the text at n. 27, below.

²⁰ 'Of the Laws of Interchange between Nations; and the Distribution of the Gains of Commerce among the Countries of the Commercial World', in *Essays on some Unsettled Questions of Political Economy*, in *Collected Works of John Stuart Mill*, vol. 4 (ed. Robson, 1967; 1st edn., London, 1844), p. 232 at p. 252.

Fredéric Bastiat, were active in the peace movement. After all, was not warfare the most obvious and extreme form of disruption of the operation of the global 'mercantile republic'? Most of the liberal political economists of the nineteenth century consciously saw themselves as laying the intellectual and material foundations for lasting peace between nations. With a bold optimism which is difficult to appreciate from the perspective of the late twentieth century, many of the classical economists and their allies expressed confidence that, once the nations of the world were shown that the path to prosperity lay in the adoption of laissez-faire economic policies and the consequent integration of the world into a single economic unit, the futility and irrationality of warfare in pursuit of petty parochial national interests would become apparent to all. As the minds of statesmen fastened ever more on the welfare of the world as a whole, and ever less on the petty pursuit of short-range self-interest, political rivalry and warfare would naturally fade away.²¹ Mill, for example, hailed international trade as 'the principal guarantee of the peace of the world' and expressed the confidence that, even as he was writing, it was rapidly rendering warfare obsolete.²² The British politician Richard Cobden perhaps best personified this intimate connection between the campaigns for freedom of trade and world peace.²³ He is most commonly remembered as a crusader for free trade. But his original interest had been in the peace movement; and his campaign on behalf of free trade was undertaken with that larger goal in mind. Small wonder, then, that he could proclaim with confidence that 'free trade is the international law of God'.²⁴

It is true that the classical liberal economists themselves did not, for the most part, trouble to translate their theories directly into juridical terms. They did not feel an urgent need to do so because, in their heady optimism, they believed that, in the course of time, their ideas would come to prevail through the sheer strength of their intrinsic merit and the ever-increasing evidence of the prosperity to which they would give rise.²⁵ Conversely, the majority of international lawyers did not by any means rush to transform their basic doctrines along the lines suggested by the political economists. By the nineteenth century the basic positivist structure of international legal theory, as received from Wolff and Vattel, was too firm to crumble in the face of the new ideas. The majority of writers continued to endorse the traditional view that it was the sovereign right of each State to decide for

²¹ For a very thorough survey of the connection between the theories of the political economists of the nineteenth century and ideas about war and peace, see Silberner, *The Problem of War in Nineteenth Century Thought* (trans. Krappe, 1946).

²² Mill, *Principles of Political Economy*, in *Collected Works of John Stuart Mill*, vol. 3 (ed. Robson, 1965; 1st edn., London, 1848), p. 594.

²³ On Cobden's ideas about international relations, see generally Dawson, *Richard Cobden and Foreign Policy: A Critical Exposition, with Special Reference to Our Day and its Problems* (1926). On Cobden's life, career and ideas generally, see Edsall, *Richard Cobden: Independent Radical* (1986); and Hinde, *Richard Cobden: A Victorian Outsider* (1987).

²⁴ Viner, 'The Intellectual History of Laissez Faire', *Law and Economics*, 3(1960), p. 45 at p. 61.

²⁵ See the text at n. 20, above.

itself, on the basis of its own perceived self-interest, whether it would or would not trade with other States.²⁶

Nevertheless, from the late nineteenth century this traditional view began to come under increasing challenge from within the international legal fraternity. A minority of lawyers, who saw themselves as a kind of international legal *avant-garde*, sought to pioneer a transformation of their discipline in the direction indicated by the liberal economists. A notable figure in this movement was the French writer Albert Geoffre de la Pradelle, who concluded that, contrary to the traditional (and, in his view, now outdated) norms of international law, China did not have the right to pursue a policy of economic isolation *vis-à-vis* the rest of the world. By playing the miser and obstinately withholding its wealth from the stream of world commerce, China, in la Pradelle's view, was injuring the world as a whole by violating what he termed its duty of international 'solidarity', i.e., its duty to co-operate with other States in raising the standard of living of mankind generally, in the way explained by the liberal political economists.²⁷

One of the most instructive contrasts between the traditional and the newer approaches to customary international law concerned the question of economic warfare. Around the beginning of the twentieth century, the phenomenon of organizing boycotts on political grounds began to come into use, most notably in China, beginning in 1905 with the US as the target (in response to restrictive immigration measures) and in the Ottoman Empire in 1908-9 (in response to the Austrian annexation of Bosnia-Herzegovina).²⁸

²⁶ See, for example, de Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage* (1831), vol. 1, pp. 310-12, for an affirmation of the 'incontestable right' of States to refuse to trade with other States if they so choose. See also Halleck, *International Law or Rules Regulating the Intercourse of States in Peace and War* (3rd edn., by Baker, 1893), vol. 1, pp. 453-4, for a contemptuous dismissal of any contention that China or Japan was under a legal duty to enter into commercial relations with other States.

²⁷ La Pradelle, 'La Question chinoise', *Revue générale de droit international public*, 8(1900), p. 272. For views of other international law writers to the same general effect, see von Liszt, *Le Droit international: exposé systématique* (trans. Gidel, 1927, from 9th German edn., 1913), pp. 74-5; Mérignhac, *Traité de droit public international* (1905), vol. 1, pp. 256-8; and Piédelièvre, *Précis de droit international public* (1894), pp. 471-2.

²⁸ On the 1905 boycott by the Chinese against the US, see Hunt, *The Making of a Special Relationship: The United States and China to 1914* (1983), at pp. 235-41; McKee, *Chinese Exclusion versus the Open Door Policy 1900-1906: Clashes over China Policy in the Roosevelt Era* (1977), pp. 103-25; and Ts'ai, 'Reaction to Exclusion: The Boycott of 1905 and Chinese National Awakening', *Historian*, 39 (1976), p. 95. For a general history of Chinese boycotting, see generally Remer, *A Study of Chinese Boycotts with Special Reference to their Effectiveness* (1933). On the boycott in the Ottoman Empire against Austria, see Quataert, *Social Disintegration and Popular Resistance in the Ottoman Empire* (1983), pp. 121-45. The word 'boycott' comes from the experiences of one Captain Charles Cunningham Boycott, an oppressive agent in Ireland for an absentee English landowner, who was subjected to total ostracism by the angry tenants of County Mayo in the early 1880s. For an account of this incident (probably somewhat embroidered) see Davitt, *The Fall of Feudalism in Ireland* (1904), pp. 274-9. The first writer to give serious attention to the boycott as a weapon of political struggle on the international scene was apparently the Indian philosopher and political theorist Aurobindo Ghose at the end of the nineteenth century. For an interesting description of his thought in this regard, see Varma, *The Political Philosophy of Sri Aurobindo* (1960), pp. 240-7. For one of the most perceptive analyses of the phenomenon from the Western standpoint, see Pinon, 'Une Forme nouvelle des luttes internationales: le boycottage', *Revue des deux mondes*, 51 (1909), p. 199.

International lawyers of the traditional stripe, like Vattel before them and the International Court later, saw no objection to the practice, on the ground that there was no legal duty on the part of States to trade with one another to begin with.²⁹ A more perceptive analysis of the question, though, came from the French lawyer Paul Fauchille in the 1920s. He pointed out that the answer given to the question of the legality of boycotting depended on which of two possible approaches one took to the broader issue of the nature of international society as a whole. If one emphasized, as the traditional law did, the *independence* of States, then the conclusion would follow that a refusal to trade, for whatever reason, would be permissible because it would be within the sovereign right of the State concerned. If, on the other hand, one started, as la Pradelle did, from a premiss emphasizing the *interdependence* of States, then the conclusion would be different. Here, as the classical political economists had pointed out, a practice such as boycotting would not be permissible because, as observed above, it was the duty of States to remove barriers to trade, not to impose them. (Fauchille, incidentally, placed himself in the traditionalist camp.)³⁰

The definitive summation of the purported principle of 'solidarity' came from Robert Redslob of the University of Strasbourg during the 1930s. In the spirit of the classical political economists and of la Pradelle, he stressed that the idea of 'solidarity' was founded upon the fact of ever-increasing interdependence among States. More specifically, he held that it has two principal aspects: mutual aid by States of one another, and the exchange of goods (this latter being rooted in the international division of labour). In Redslob's opinion, it was now necessary for modern international law to reverse the old priority set by Wolff and Vattel in the eighteenth century and to hold that, contrary to their views, a State's duties to the international community at large should now take precedence over its own parochial and short-term interests. He denounced the 'pseudo-morality' of utilitarianism, with its emphasis on the single-minded pursuit of national self-interest, in favour of a more cosmopolitan and humanitarian outlook.³¹

Of a similar turn of mind was the American lawyer Ellery C. Stowell. In a spirit reminiscent of Cobden, he argued that the purpose of international law should be not merely the keeping of the peace but also the facilitating of mutually beneficial commercial intercourse. He condemned as 'ill-advised' the attempt by international lawyers 'to adopt the doctrine of absolute sovereignty as the a priori basis of our system'.³²

²⁹ See, for example, Baty, *International Law* (1909), pp. 64–71, in which the author says (at pp. 65–6): 'It is indeed difficult to understand the objections brought against the . . . principle of the boycott. That persons who strongly disapprove of the character and acts of another should bind themselves to have no intercourse with him, and to unite others with them in that course, seems the most natural thing in the world. . . .' See also, to this same general effect, Lauterpacht, 'Boycott in International Relations', this *Year Book*, 14 (1933), p. 125 at pp. 139–40.

³⁰ Fauchille, *Traité de droit international public* (1926), vol. 1, part 1, pp. 487–8.

³¹ Redslob, *Les Principes du droit des gens moderne* (1937), pp. 174–91.

³² Stowell, *International Law: A Restatement of Principles in Conformity with Actual Practice* (1931), pp. 137–41.

Beliefs of this kind were, in the meantime, finding a ready audience among certain statesmen, and particularly Americans. President Woodrow Wilson, whose views on this matter were widely shared by his fellow-countrymen, believed that an important cause of the First World War had been the economic nationalist policies of the European States and the bitter rivalries which they had fostered.³³ He accordingly included among his famous Fourteen Points of January 1918 'the removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions' among member States of the proposed League of Nations.³⁴ In this same vein, he included among his five Additional Points later that year a proposal for an express prohibition on 'selfish economic combinations or any form of economic coercion' by League members against one another.³⁵ (In the event, however, the League of Nations Covenant did not include a strong commitment of this kind to the general removal of economic barriers between states.)³⁶

During the period between the two World Wars, there were two notable areas in which concerns of this kind manifested themselves. First was that of access by States to supplies of vital raw materials. Fears were expressed that, unless the 'have-not' States (as they were known) could be guaranteed access to essential raw-material supplies, the seeds of future wars would be sown.³⁷ Japan, clearly a charter member of this fraternity, duly became a leading advocate of international guarantees of access to essential raw materials.³⁸ In language clearly reminiscent of la Pradelle, the Japanese Government endorsed the proposition that 'it is the great duty of every government today to open wide its economic doors, and to extend to all people free access to what is vital to existence,

³³ Hogan, *Informal Entente: The Private Structure of Cooperation in Anglo-American Economic Diplomacy, 1918-1928* (1977), at pp. 13-14. For Wilson's views on the subject of international economic relations generally, see Diamond, *The Economic Thought of Woodrow Wilson* (1943), pp. 131-92; and Link, *Woodrow Wilson: Revolution, War, and Peace* (1979), pp. 72-103.

³⁴ Wilson, 'Address to the Congress, on the Conditions of Peace, January 8, 1918', in Scott (ed.), *President Wilson's Foreign Policy: Messages, Addresses, Papers* (1918), p. 354 at pp. 359-60.

³⁵ Link, *op. cit.* above (n. 33), at p. 86 fn.

³⁶ Article 23 (e) of the Covenant committed member States to securing and maintaining 'freedom of communications and of transit and equitable treatment for the commerce' of other League members; but it made this obligation '[s]ubject to and in accordance with the provisions of international Conventions existing or hereafter to be agreed upon'. The Permanent Court held in the case of *Railway Traffic between Lithuania and Poland*, PCIJ, Series A/B, No. 42 (1931), that Article 23 (e) did not itself require States to do these things, in the absence of other, independent, treaty obligations. On efforts which the League of Nations undertook during its existence to promote free trade, see League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* (1942); and Rappard, *Post-war Efforts for Freer Trade* (1938).

³⁷ See, for example, Darvall, *The Price of European Peace* (1937); Dulles, *War, Peace and Change* (1939); Simonds and Emery, *The Great Powers in World Politics: International Relations and Economic Nationalism* (1935); and Smith, *The Strategy of Minerals: A Study of the Mineral Factor in the World Position of America in War and Peace* (1919).

³⁸ For a highly informative (though unsympathetic) account of the Japanese position on this issue during the 1920s, see Young, *Japan's Special Position in Manchuria: Its Assertion, Legal Interpretation and Present Meaning* (1931), pp. 298-326.

and thus to save the more unfortunate from unnatural misery and discrimination'.³⁹

The second area of concern was economic warfare, and specifically the practice of boycotting. The League of Nations was compelled to turn its attention to this question after the Japanese invasion of Manchuria in 1931. One of China's responses to the invasion took the form of a boycott by the Chinese population of Japanese goods. In the debates in the League over the crisis, Japan condemned the boycott as an act of hostility for which the Chinese Government, in its view, was legally responsible.⁴⁰ No judicial pronouncement was ever made on this point, but it is of some interest to note briefly the general approach that the political organs of the League took towards the matter. The fact-finding body which it despatched to the Far East (the Lytton Commission, named after its chairman) carefully disclaimed any intention of pronouncing on the legality of the boycott under international law, turning its attention instead to the methods used to enforce the boycott and the role of the Chinese Government in organizing it.⁴¹ The fact is, though, that the question of the extent of participation by the Chinese Government could hardly have been relevant except on the tacit assumption that boycotting was, in at least some sense, wrongful. This tacit assumption of illegality was apparent throughout the debates in the League. In the League Council, for example, the approach taken by Wellington Koo (a future judge of the ICJ) was to argue not that boycotting was lawful *per se* but rather that it was justified in this particular case as a measure of self-defence or reprisal against Japan for its prior unlawful act of invasion.⁴² The Assembly of the League substantially endorsed this view in 1933, by characterizing the boycott as a reprisal.⁴³ It would perhaps be unwise to read too much legal significance into such a finding by a political body in the heat of a crisis. Nevertheless, the affair is an instructive illustration of a widely shared, if still somewhat vague, feeling that acts of economic hostility such as boycotting were in principle wrongful.

Ideas of this kind were soon to become central to the legal ordering, or re-ordering, of international society generally. As in the aftermath of the First World War, the Americans took the most forthright stance. The key figure now was Cordell Hull who, during his tenure as Secretary of State from 1933 to 1944, was a tireless crusader for the twin—and, in his view, inseparable—causes of free trade and peace. Hull was a thorough-going

³⁹ *Ibid.*, at p. 307.

⁴⁰ *League of Nations Official Journal*, 13 (1932), p. 1872.

⁴¹ Report of the Commission of Enquiry (Lytton Commission), LN Doc. C.663.M.320.1932.VII (1932), at p. 120. The Commission pleaded that 'this problem should be considered at an early date and regulated by international agreement': *ibid.*

⁴² *League of Nations Official Journal*, 13 (1932), pp. 1883–4.

⁴³ 'Report Provided for in Article 15, Paragraph 4 of the Covenant, Submitted by the Special Committee of the Assembly in Execution of Part III (Paragraph 5) of the Resolution of March 11th, 1932, and Adopted by the Assembly on February 24th, 1933', *ibid.*, Special Supplement 112 (1933), at pp. 56, 72. For an excellent account of the League's consideration of the boycott aspect of the Manchurian crisis, see Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp. 604–22.

Cobdenite, believing that free trade was, as he put it, 'the spear-point of peace'.⁴⁴ The Atlantic Charter of August 1941, which set out many of the basic principles which the UN Charter would later embody, reflected these concerns (although not as strongly as Hull would have liked). One of the principles stated in it was 'the desire to bring about the fullest collaboration between all nations in the economic field . . .'. Another was the goal of furthering 'the enjoyment by all States . . . of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity'.⁴⁵

These concerns duly found their way, at least in a very general fashion, into the UN Charter in 1945. One of the purposes of the organization, as stated in Article 1, is '[t]o achieve international co-operation in solving international problems of an economic . . . character'. Article 55 confirms this goal by stating it to be the duty of the UN to promote 'higher standards of living, full employment, and conditions of economic and social progress and development'. In Article 56, the member States pledge themselves 'to take joint and separate action' in co-operation with the organization to achieve these ends. It is true that the UN Charter does not expressly link these economic concerns with the organization's principal function, the safeguarding of international peace; but it is apparent from the historical circumstances surrounding the formation of the post-1945 world order that these two aspects of international life were intimately related.

The basic idea, broadly speaking, was to promote a truly durable peace on the basis of material prosperity, in the manner foreseen by the classical liberal economists. There was no longer an optimistic assumption, however, that this state of affairs would come about naturally. A degree of guidance was clearly called for. The basic strategy was to effect a sharp separation between the political and the economic spheres of international relations, with each sphere to be guided by norms, and equipped with institutional structures, appropriate to its nature. As a result, economic relations between States would be insulated, to the greatest extent possible, from political relations, and thereby be set free to take their own 'natural' course.⁴⁶

⁴⁴ *The Memoirs of Cordell Hull* (1948), p. 525. On the strongly Cobdenite outlook of Hull, see Gaddis, *The United States and the Origins of the Cold War 1941-1947* (1972), at pp. 18-23; and Allen, 'The International Trade Philosophy of Cordell Hull', *American Economic Review*, 43 (1953), p. 101.

⁴⁵ Atlantic Charter, 14 August 1941, UK/US: Royal Institute of International Affairs, *United Nations Documents 1941-1945* (1946), at pp. 9-10. On the drafting of the economic provisions of the Atlantic Charter, see Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932-1945* (1979), at pp. 281-5; Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and Prospects of our International Economic Order* (3rd edn., 1980), pp. 40-53; and Langer and Gleason, *The Undeclared War 1940-1941* (1953), at pp. 682-8.

⁴⁶ The most explicit legal articulation of this principle appears in the Articles of Agreement of the International Bank for Reconstruction and Development (World Bank), 27 December 1945: *United Nations Treaty Series*, vol. 2, p. 134. Article 3(5)(b) stipulates that loan arrangements are to be made 'with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations'. Article 4(10) provides that '[o]nly economic considerations' shall be relevant to the lending decisions made by the Bank. On the difficult problems to which these

The political component of this post-war order was centred upon the UN, which was based upon the traditional principle of the sovereign equality of States, substantially as inherited from Wolff and Vattel. The primary function of the UN was to keep the peace in the narrow sense of that term, by dealing, through its collective security apparatus, with emergencies in the form of actual outbreaks of violence (or threats thereof). In addition, the UN Charter imposed upon States, in Article 2(4), a basic minimum standard of neighbourly conduct: they were to refrain from the threat or use of force.

In the sphere of economic relations, on the other hand, the standard of conduct expected of States was to be distinctly higher. Here, the dominant ethos would be that of co-operation, in the spirit of the principle of 'solidarity' as expounded by la Pradelle, Redslob and Stowell. In place of the rivalry and ruthless pursuit of self-interest that was all too characteristic of political relations, the stress in the economic realm would be on co-operation in the common cause of advancing the material well-being of mankind as a whole. More broadly, this ethos of co-operation in the cause of prosperity would be the principal guarantor, in the long run, of world peace, as the siren-call of material wealth increasingly lured nations away from petty political jealousies, in the way that the classical economists of the previous century had foretold.⁴⁷

The principal institution of the economic system, analogous to the UN in the political sphere, was to have been the International Trade Organization (ITO). According to its constitutional instrument, the Habana Charter of 1948, the ITO was to oversee such areas of international economic life as tariffs, unfair trading practices, foreign investment, commodity agreements and State trading.⁴⁸ It was to be equipped with a general conference of all the member States, analogous to the UN General Assembly, and was also to have a dispute-settlement mechanism. In the event, the ITO never came into existence, because of the ironic failure of the US, its principal sponsor,

provisions gave rise in the 1960s in the context of World Bank lending to South Africa and Portugal, see Mason and Asher, *The World Bank since Bretton Woods* (1973), pp. 586–91; and Bleicher, 'UN v. IBRD: A Dilemma of Functionalism', *International Organization*, 24 (1970), p. 31.

⁴⁷ On the importance of a global, open-door economic order as a vital component of world peace, in the broad sense, in the post-World War II order, see generally Baldwin, *op. cit.* above (n. 8), at pp. 206–10; Gaddis, *op. cit.* above (n. 44), at pp. 18–23; Maier, *In Search of Stability: Explorations in Historical Political Economy* (1987), pp. 121–52; Kolko, *The Politics of War: The World and United States Foreign Policy, 1943–1945* (1968), at pp. 242–79; Pollard, *Economic Security and the Origins of the Cold War, 1945–1950* (1985), at pp. 1–9, 243–53; Eckes, Jr, 'Open Door Expansionism Reconsidered: The World War II Experience', *Journal of American History*, 59 (1973), p. 909; Gilpin, 'Economic Interdependence and National Security in Historical Perspective', in Knorr and Trager (eds.), *Economic Issues and National Security* (1977), p. 19 at pp. 45–53; and Pollard 'Economic Security and the Origins of the Cold War: Bretton Woods, the Marshall Plan and American Rearmament, 1944–1950', *Diplomatic History*, 9 (1985), p. 271.

⁴⁸ Habana Charter, 21 March 1948, UN Doc. E/Conf. 2/78 (1948). On the provisions of the Habana Charter generally, see Brown, *The United States and the Restoration of World Trade: An Analysis and Appraisal of the ITO Charter and the General Agreement on Tariffs and Trade* (1950); Wilcox, *A Charter for World Trade* (1949); and Fawcett, 'The International Trade Organization', *this Year Book*, 24 (1947), p. 376.

to ratify the Habana Charter.⁴⁹ In its place (though far less sweeping in its coverage) was the General Agreement on Tariffs and Trade (GATT) of 1947.⁵⁰ In addition, a variety of other functional organizations were established to promote co-operation in such areas as international monetary relations (the International Monetary Fund, or IMF), civil aviation (the International Civil Aviation Organization, or ICAO), agriculture (the Food and Agriculture Organization, or FAO) and maritime matters (the Intergovernmental Maritime Consultative Organization, or IMCO). Despite the still-birth of the ITO, therefore, the basic vision of a post-war international system organized into two more or less distinct spheres—the political and the economic—remained essentially intact.

The founding fathers of this post-World War II system of world order did not outlaw economic warfare explicitly and directly. In fact (as will be seen in further detail in Section III below), the Western countries have consistently opposed efforts by Third-World States to promulgate such a direct prohibition.⁵¹ It would be very wrong to conclude, however, that the Western countries have been opposed, in principle, to restrictions upon the waging of economic warfare. Quite the opposite is the case, as we are now in a position to appreciate. In the Western scheme of things, an express prohibition against economic warfare is not objectionable in principle. Rather, it is *unnecessary*, in the light of the general nature of the dual system of international relations—political and economic—that was instituted in the 1940s. If economic and political relations could be kept rigorously separate from one another, then there would still be ample room for disputes to arise within the economic sphere (e.g., disputes over allegations of unfair trading practices, such as dumping). But there would be no scope, ideally at least, for disruptions of economic relations in connection with political disputes.

As part of this same basic policy, the Western countries have been similarly reluctant to allow matters of economic relations to intrude into the political sphere. They have therefore preferred to deal with questions of economic relations on their own terms (i.e., as technical economic matters) and to avoid politicizing them.⁵² For this reason, the Western States have consistently opposed all attempts to interpret concepts of a political nature such as force and aggression as encompassing economic warfare. But this opposition to the intertwining of economic and political issues should not be confused with opposition in principle to the restricting of economic war-

⁴⁹ On the failure of the Habana Charter to enter into force, see generally Diebold, *The End of the International Trade Organization* (1951). On the opposition to it which developed in the US and other countries after the drafting, see Gardner, *op. cit.* above (n. 45), at pp. 369–78.

⁵⁰ 30 October 1947: *United Nations Treaty Series*, vol. 55, p. 194. Strictly speaking, the GATT is a treaty and not an organization, as the ITO was intended to be. In fact, however, the GATT system functions, for all intents and purposes, as if it were a true international organization. For the purposes of this discussion, the distinction is not material.

⁵¹ See the text at n. 104, below.

⁵² See n. 126, below.

fare. On the Western view, there has simply been no need to posit the existence of an explicit and autonomous rule of customary international law forbidding economic warfare, not because no such principle exists, but rather because it emerges naturally and automatically from the *general* legal and institutional structure of the post-war world.

Precisely because the ethos of 'solidarity' is a characteristic of the post-war system of world order as a whole, it makes only a deceptively modest appearance in the specific texts with which lawyers are most accustomed to dealing. Consider the GATT, for example. It certainly does not expressly endorse the principle of 'solidarity' in the sweeping form in which la Pradelle and Redslob had stated it. On its face, it confines itself instead to the apparently more modest goal, as expressed in the preamble, of bringing about 'the elimination of discriminatory treatment in international commerce'. It is important, however, to appreciate that this concept of non-discrimination is best seen not as a substitute for, but rather as an implementation of, the basic ethos of 'solidarity'. It is essentially the expression, in modern juridical terms, of a rich complex of ideas and ideals which are fundamentally economic in character.

Turning to the question of economic warfare in particular, it is clear that practices such as the mounting of boycotts on political grounds are just as incompatible with the principle of non-discrimination in the GATT as they were with the idea of 'solidarity' in times past. The most relevant specific provision of the GATT in this regard is Article XI, which bans 'prohibitions or restrictions . . . on the importation of any product of . . . any other contracting party or on the exportation . . . of any product destined for the territory of any other contracting party'. It is true that the divorce between political and economic relations, as reflected in the GATT, is by no means complete. The most noteworthy exception to this general policy is the presence of a national-security exception in Article XXI, permitting a State party to derogate from the basic GATT rules when 'it considers it necessary for the protection of its essential security interests . . . in time of war or other emergency in international relations'. It is clear, however, that this national-security provision is an exception to the general policy of the GATT.⁵³

During the 1980s, several occasions arose for a confirmation and reaffirmation of the basic policies of the GATT—and, by extension, of the structure of the post-1945 system of world order generally. One such opportunity presented itself in 1982, as a result of complaints made by Argentina about the imposition of economic measures against it by States sympathetic to the UK during the Falklands conflict of that year. The essence of Argentina's contention, supported by a number of Third-World

⁵³ On Article XXI of the GATT, see Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (1969), pp. 748–52; and Knoll, 'The Impact of Security Concerns upon International Economic Law', *Syracuse Journal of International Law and Commerce*, 11 (1984), p. 567 at pp. 581–607.

countries, was that measures of that kind were violations of the GATT, because they were imposed on political, rather than bona fide economic, grounds.⁵⁴ In response, the GATT ministerial declaration of November 1982 contained a statement that contracting States were 'to abstain from taking restrictive trade measures of a non-economic character, not consistent with the General Agreement'.⁵⁵

That this policy of keeping economic relations separate from political ones is something to be taken seriously within the context of the GATT became apparent from the results of two claims which Nicaragua raised against the US. The first concerned action taken by the US in 1982 to deprive Nicaragua of its right to export a certain quota of sugar for sale in the high-price American market. There was no doubt that the action had been taken on political, rather than economic, grounds. In 1984, a GATT panel upheld Nicaragua's complaint that the measure violated the GATT principle of non-discrimination⁵⁶ (although the US refused to reinstate the quota, precisely on the ground that broader considerations than economic ones were involved in the dispute).⁵⁷

More instructive was the second Nicaraguan complaint in GATT against the US, concerning the trade boycott instituted in 1985—the same issue with which the International Court had dealt so summarily, as observed above, from the standpoint of general customary international law. As it happened, the GATT panel was not able to pronounce upon the merits of Nicaragua's claim, because the US invoked the national-security exception of the GATT as a justification. The panel did, however, caustically note in its report in 1986 that boycotts 'such as the one imposed by the United States, independent [*sic*] of whether or not they were justified under Article XXI, run counter to the basic aims of the GATT, namely to foster non-discriminatory and open trade policies, to further the development of the least-developed contracting parties and to reduce uncertainty in trade relations'.⁵⁸ It went on to express the hope that States would not make use of their rights under the national-security exception—a provision that clearly is political rather than economic in character—until they had 'carefully weighed' their security needs, on the one hand, against 'the need to maintain stable trade relations', on the other.⁵⁹

⁵⁴ *GATT Focus*, June 1982, at p. 4.

⁵⁵ *Basic Instruments and Selected Documents*, Supplement No. 29, at pp. 9, 11. On the relevance of the GATT norms to the Falklands conflict, see Mayall, 'The Sanctions Problem in International Economic Relations: Reflections in the Light of Recent Experience', *International Affairs*, 60 (1984), p. 631 at pp. 635–7.

⁵⁶ 'United States Imports of Sugar from Nicaragua: Report of the Panel', *Basic Instruments and Selected Documents*, Supplement No. 31, at p. 67. This case has the distinction of constituting the only formal finding, to date, of the illegality of an act of economic warfare. Concerning this case see Knoll, loc. cit. above (n. 53), at pp. 598–9, 603–6.

⁵⁷ GATT, *GATT Activities in 1984*, at p. 39.

⁵⁸ GATT Doc. L/6053 (1986), at p. 18.

⁵⁹ Ibid.

The International Court, in dealing with the same incident the same year, expressed no such need for a 'careful weighing' of competing political and economic interests. The probable reason is that (as noted above) it was considering the question exclusively from the political standpoint. That is to say, it was concerned only with the question of the infringement of sovereign rights, through such means as intervention in internal affairs and the use of force. The Court in effect conceded as much in its judgment by tersely noting that questions of breaches of the GATT were outside its jurisdiction and that, in any event, the GATT had only been 'referred to in passing' by the counsel for Nicaragua.⁶⁰

It is clear, then, that the Court also did not consider (although arguably it could have) the crucial questions arising from the broader significance of the GATT—i.e., the issues raised not by the text of the agreement considered in isolation, but rather by the role that the GATT plays in the larger programme of bringing order and stability to international relations generally.⁶¹ If the International Court had endorsed the Western liberal strategy for promoting world peace in its fullest sense, instead of concentrating on narrower issues such as intervention and the use of force, it would have reached a different conclusion on the legality of the trade boycott. It would have recognized the existence of a general principle that States should keep their economic relations insulated as carefully as possible from their political ones—a general principle whose specific form is a duty of non-discrimination in economic relations on political grounds, and whose clear implication is that economic warfare is, at least in principle, impermissible.

III. THE SOCIALIST APPROACH: FROM 'CAPITALIST ENCIRCLEMENT' TO NON-DISCRIMINATION

The evolution of the socialist countries' position on the legality of economic warfare may be treated more briefly than that of the Western States. The economic policies of the socialist States are rooted not in the classical liberal tradition of Adam Smith and his followers, but rather, in terms of doctrine, on the labour theory of value as expounded by Karl Marx in the nineteenth century and, in practice, on the central planning system inaugurated by Stalin in the USSR in the 1920s and 1930s.

The liberal and the socialist views of international economic relations, however, are, in certain significant respects, not so incompatible as some might initially suppose. It is true that Marx himself had little interest in the

⁶⁰ *Nicaragua v. US*, loc. cit. above (n. 2), at p. 126, para. 245.

⁶¹ See the text at n. 46, above.

question of free trade among States.⁶² It is true too that the Stalinist system of central planning has tended to make the socialist economies highly autarkic.⁶³ More significant for present purposes, however, is the fact that the socialist countries have been consistent advocates of a general norm of non-discrimination in international economic relations. The socialist States also share with their Western counterparts a reluctance to endorse the existence of an explicit norm of customary international law prohibiting economic warfare. They have generally provided passive support for Third-World initiatives of this kind (which will be discussed in the following section), but they have carefully refrained from taking the lead in them.⁶⁴

There is one major difference between the socialist position in this area and the Western one. To the socialist countries, the principle of non-discrimination in economic relations (as well as, more broadly, the principle of divorcing economic relations from political ones) is essentially an autonomous concept. It is true that the socialist countries speak of international economic relations in terms of such general principles as the 'international division of labour' and the 'principle of

⁶² Marx expressed contempt for the materialistic obsession of the bourgeoisie with what he called 'that single, unconscionable freedom' known as free trade: Marx and Engels, 'Manifesto of the Communist Party', in *Karl Marx and Friedrich Engels: Selected Works in One Volume* (1968; 1st edn., London, 1848), p. 31 at p. 38. The context in which these remarks appear, however, is a general denunciation of bourgeois practices. Marx did not ever devote significant attention to the subject of international trade.

⁶³ On Stalin's programme of economic autarky, see generally Day, *Leon Trotsky and the Politics of Economic Isolation* (1973); and Parrott, *Politics and Technology in the Soviet Union* (1983), pp. 19-75. On the general tendency of centrally planned economies towards autarky, see Viner, *International Trade and Economic Development* (1953), pp. 74-93; and Neuberger, 'Central Planning and its Legacies: Implications for Foreign Trade', in Brown and Neuberger (eds.), *International Trade and Central Planning: An Analysis of Economic Interactions* (1968), p. 349.

⁶⁴ The socialist countries have consistently given the highest priority in international circles to the restricting of the use of military force, as opposed to 'economic aggression', indirect aggression and the like. The original proposal by the Soviet Union for a definition of aggression, for example, dealt only with aggression by direct armed force: UN Doc. A/C.1/608 (1950), reprinted in *General Assembly Official Records*, 5th Session, Annexes (Agenda Item 72), at p. 4 (1950). In response to criticism from a number of Latin-American countries, to the effect that the Soviet approach failed to take account of various forms of indirect aggression, including 'economic aggression', the Soviet Union modified its draft proposal to encompass 'economic aggression': UN Doc. A/AC.66/L.2/Rev.1 (1953), reprinted in Report of the Special Committee on the Question of Defining Aggression, *General Assembly Official Records*, 9th Session, Supplement No. 11, at p. 13, UN Doc. A/2638 (1953). For the Soviet Union's admission that it had taken this step in response to criticism from the developing countries, see *ibid.*, at p. 9.

A more recent indication of the position of the socialist countries in this regard took place in the course of debates over the Soviet Union's proposal in the 1970s for a multilateral convention on the non-use of force. Here again, the developing countries were anxious to include a provision on economic warfare. This time, the socialist States resisted the idea: see Summary Records of the 13th Meeting of the Special Committee on Enhancing the Effectiveness of the Principle of Non-use of Force in International Relations, UN Doc. A/AC.193/SR.13 (1978), at pp. 12-13. (In the event, the UN General Assembly adopted a declaration on this subject in 1987, in lieu of the Soviet Union's proposed convention: see n. 112, below.)

mutual advantage'.⁶⁵ But these ideas appear to be little more than matters of the most general common sense, wholly lacking the coherence, depth and rigour which Western liberal economic thinking has attained in this area over the years.

In general, the socialist countries, while strongly supporting the concept of non-discrimination in economic relations, have shown no sign of subscribing to ideas of 'solidarity' of the kind propounded by la Pradelle or Redslob or Stowell. On the contrary, they not only continue to accept, but also strongly to insist upon, the continuing validity and fundamental character of the principle of the sovereign equality of States which lies at the heart of traditional international law. The very purpose of the norm of non-discrimination, to the socialist countries, has been to reinforce these traditional principles, not to transform or undermine them. More specifically, the purpose of the norm of non-discrimination is to ensure that each State is left free to adopt whatever domestic economic and social system it chooses without fearing that it will suffer from measures of economic discrimination by other States on that ground alone.⁶⁶

The nature of the socialist countries' concern on this score is readily apparent from a brief survey of the historical circumstances in which it emerged. The impetus behind the concept of non-discrimination was clearly the desire to defeat what Stalin denounced as the policy of 'capitalist encirclement' (i.e., economic isolation) of the Soviet Union on the part of the capitalist powers in the wake of the Russian Revolution.⁶⁷ Concrete action towards this end began shortly after the Bolshevik consolidation of power, in the form of a policy of concluding bilateral trade agreements designed to preclude such measures. The first significant step in this direction was an agreement with the UK in March 1921, in which the two States agreed, *inter alia*, 'not to impose or maintain any form of blockade against each other' and 'not to exercise any discrimination' against one another's trade, as compared with their treatment of third States.⁶⁸ In the ensuing years, the Soviet Government proceeded to conclude a series of agreements containing similar commitments on the part of each party to refrain from participating in boycotts mounted against the other by third States. Agreements

⁶⁵ See, for example, Shershnev, *On the Principle of Mutual Advantage: Soviet-American Economic Relations* (trans. Shirokov, 1978).

⁶⁶ The Soviet Union has stressed that the development of trade between countries is a good thing, provided that it results in benefits to all parties concerned and does not entail intervention in the internal affairs of States. See, for example, the statement of the Soviet Union to that effect in the Second Committee of the UN General Assembly, *General Assembly Official Records*, 3rd Session, 2nd Committee, 73rd meeting, at p. 214, UN Doc. A/C.2/SR.73 (1948).

⁶⁷ Stalin, 'Political Report to the Central Committee, December 18 [1925]', in *Works*, vol. 7: 1925 (1954), p. 267 at p. 305.

⁶⁸ Trade Agreement, 16 March 1921, Russia/UK, Article 1: *British and Foreign State Papers*, vol. 114, p. 373; *League of Nations Treaty Series*, vol. 4, p. 127.

to this effect were reached with Turkey (in 1925),⁶⁹ Germany (in 1926),⁷⁰ Lithuania (in 1926),⁷¹ Persia (in 1927),⁷² Afghanistan (in 1931),⁷³ Estonia (in 1932)⁷⁴ and Latvia (in 1932).⁷⁵ In addition, agreements concluded with Germany (in 1925)⁷⁶ and Latvia (in 1927)⁷⁷ included provisions that the commercial relations between the parties were to be governed solely by economic considerations. (More conventional provisions for MFN status were negotiated with Denmark (in 1923),⁷⁸ Japan (in 1925),⁷⁹ Norway (in 1925),⁸⁰ Estonia (in 1929)⁸¹ and Turkey (in 1931).)⁸²

At the League of Nations in 1931, the Soviet Union went further and proposed the adoption of a multilateral Pact of Economic Non-aggression, the essence of which was a requirement on the part of States parties to forgo 'any discrimination whatever' in their economic relations with one another.⁸³ The proposal was basically designed to counter anti-dumping measures which various States had imposed against Soviet goods and was, in all probability, hardly intended to be taken seriously (as, indeed, it was not).⁸⁴ Even so, it can hardly be concluded that the Soviet Government was anything but sincere in its general campaign for a principle of non-discrimination.

In addition, it should be noted that, at the time that the planning was taking place for the institutional structure (both political and economic) of

⁶⁹ Treaty of Friendship and Neutrality, 17 December 1925, Turkey/USSR, Protocol II: *League of Nations Treaty Series*, vol. 157, p. 353.

⁷⁰ Treaty signed at Berlin, 24 April 1926, Germany/USSR, Article 3: *ibid.*, vol. 53, p. 387.

⁷¹ Treaty of Non-aggression, 28 September 1926, Lithuania/USSR, Article 4: *ibid.*, vol. 60, p. 145.

⁷² Treaty of Guarantee and Neutrality, 1 October 1927, Persia/USSR, Article 3: *ibid.*, vol. 112, p. 275.

⁷³ Treaty of Neutrality and Non-aggression, 24 June 1931, Afghanistan/USSR, Article 2: *ibid.*, vol. 157, p. 371.

⁷⁴ Treaty of Non-aggression and Peaceful Settlement of Disputes, 4 May 1932, Estonia/USSR, Article 2: *ibid.*, vol. 131, p. 297.

⁷⁵ Treaty of Non-aggression, 5 February 1932, Latvia/USSR, Article 2: *ibid.*, vol. 148, p. 113.

⁷⁶ Treaty of Friendship, 12 October 1925, Germany/USSR, Article 1: *British and Foreign State Papers*, vol. 122, p. 707.

⁷⁷ Treaty of Commerce, 2 June 1927, Latvia/USSR, Article 1: *League of Nations Treaty Series*, vol. 68, p. 321.

⁷⁸ Preliminary Agreement, 23 April 1923, Denmark/Russia, Article 2: *ibid.*, vol. 18, p. 15.

⁷⁹ Convention Embodying Basic Rules of Relations, 20 January 1925, Japan/USSR, Article 4: *ibid.*, vol. 34, p. 31.

⁸⁰ Treaty of Commerce and Navigation, 15 December 1925, Norway/USSR, Article 15: *ibid.*, vol. 47, p. 9.

⁸¹ Treaty of Commerce, 17 May 1929, Estonia/USSR, Article 13: *ibid.*, vol. 94, p. 323.

⁸² Treaty of Commerce and Navigation, 16 March 1931, Turkey/USSR, Article 16: Degras (ed.), *Soviet Documents on Foreign Policy*, vol. 2: 1925-1932 (1952), at p. 479.

⁸³ Draft Protocol of a Pact of Economic Non-aggression submitted by the Soviet Delegation to the Commission of Enquiry on European Union: *ibid.*, at pp. 499-500.

⁸⁴ For the Soviet Union's own explanation of the draft protocol, see Minutes of the Session of 2-5 November 1931 of the Commission of Enquiry on European Union, LN Doc. C.910.M.478.1931.VII (1931), at pp. 11-17. For the records of the discussion in the Commission, see generally *ibid.* For the report of the special committee which was appointed to examine the draft protocol, see Report by the Special Committee Appointed to Examine the Draft Pact of Economic Non-aggression, *League of Nations Official Journal*, 13 (1932), p. 152. For a brief account of this initiative by the Soviet Union, see Haslam, *Soviet Foreign Policy 1930-1933: The Impact of the Depression* (1983), pp. 51-2.

the post-1945 world, neither the Soviet Union itself nor the Western powers saw any fundamental barrier to Soviet participation in the global, open-door 'mercantile republic' which Hull and his comrades were designing. The USSR participated in the Bretton Woods conference of 1944 which laid the foundations for the IMF and the World Bank.⁸⁵ The Habana Charter too was drafted with a view to accommodating the State-trading systems of the socialist countries. State-trading entities were enjoined to 'act in a manner consistent with the general principles of non-discriminatory treatment' which formed the basis of the Charter (as of the GATT). More specifically, such entities were to undertake their purchasing 'solely in accordance with commercial [i.e., not political] considerations'.⁸⁶ So long as the socialist States adhered to the basic norm of non-discrimination, then the founding fathers of the post-World War II order saw no fundamental bar to their participation in the great global 'mercantile republic' in the making.⁸⁷

In the event, the onset of the Cold War in the late 1940s upset these plans to integrate the socialist countries into the global economy.⁸⁸ The Soviet Union declined to ratify the Articles of Agreement of the IMF and the World Bank, stood obstinately aloof from both the GATT and the ITO, and condemned the whole idea of a multilateral, open-door world economy as a vehicle for American economic domination.⁸⁹ It continued, however, to insist upon the validity of the principle of non-discrimination, taking care to contend that it was not based on the need to adopt any *particular* global economic regime (i.e., that it was not tied to the Western liberal programme of dismantling economic barriers between States generally).⁹⁰

An appropriate occasion for the continued championing of this principle of non-discrimination arose in the late 1940s, when the Western countries, led by the US, began to impose a strategic embargo against the socialist States (i.e., to restrict the sale of goods which might have military utility).⁹¹ The socialist countries reacted at the UN by sponsoring a resolution

⁸⁵ Van Dormael, *Bretton Woods: Birth of a Monetary System* (1978), pp. 216–21.

⁸⁶ Habana Charter, loc. cit. above (n. 48), Article 29(1)(a).

⁸⁷ For the tolerant views of the US Department of State on the subject of State trading—provided that State traders operated on the basis of economic, rather than political, considerations—see US Department of State, *Proposals for Expansion of World Trade and Employment*, Department of State Publication No. 2411 (1945), at p. 17. Over the course of time, a number of socialist countries have become parties to the GATT (Yugoslavia, Poland, Hungary and Romania). By the late 1980s, it was thought that the Soviet Union itself might become a party.

⁸⁸ For an excellent general account of the early Cold War period which accords substantial attention to the area of economic relations, see generally Paterson, *Soviet-American Confrontation: Postwar Reconstruction and the Origins of the Cold War* (1973).

⁸⁹ For an expression of the views of the socialist countries to this effect, see the statement by Poland in *UN Economic and Social Council Official Records*, 8th Session (7 February–18 March 1949), 270th meeting, at p. 551.

⁹⁰ For a statement by Poland to this effect, see *Plenary Meetings of the General Assembly: Summary Records of Meetings 21 September–12 December 1948*, at pp. 594–5.

⁹¹ For useful general accounts of the formative period of the strategic embargo, see Adler-Karlsson, *Western Economic Warfare 1949–1967: A Case Study in Foreign Economic Policy* (1968), pp. 22–6; Eckes, Jr, *The United States and the Global Struggle for Minerals* (1979), pp. 153–7; Paterson, op. cit.

in the General Assembly, unsuccessfully, to the effect that the UN Charter forbids 'any discrimination in trade or credit policy which is calculated to apply sanctions or to influence the domestic or foreign policy of any other country'.⁹²

Another occasion for the USSR to assert this principle presented itself in the mid-1970s, in the context of steps taken by the US to restore MFN trading status to the Soviet Union (which had been revoked in 1951). That restoration was made conditional, by means of the Jackson-Vanik amendment to the Trade Act of 1974, on the Soviet Union's liberalizing of its policy on emigration.⁹³ In the event, the Soviet Government rejected the condition, on the stated ground that it was unwilling to accept 'a trade status that is discriminatory and subject to political conditions . . .'.⁹⁴

The most recent pronouncements by the socialist countries on this question took place in 1985, in the course of debates in the UN Security Council over Nicaragua's complaint against the US trade boycott. In the course of the debate, the Soviet Union noted that 'unilateral political limitations on trade and arbitrary boycotts or sanctions of any kind create an atmosphere of tension and mistrust in international economic relations . . .'.⁹⁵ Poland expressed rather more forthright views on the subject (as well it might, since it was the object itself of various economic measures imposed by the US in response to its declaration of martial law of 1981). It condemned the American boycott of Nicaragua as 'totally unlawful and inconsistent with the provisions of the Charter of the United Nations', referring specifically to Articles 1 and 2.⁹⁶ It also attacked the boycott on the ground that it undermined 'the established practice of international trade relations . . . that political elements are not introduced into trade or commerce'.⁹⁷ The Ukraine joined the chorus, condemning the boycott as a violation of the

above (n. 88), at pp. 66-74; Pollard, *op. cit.* above (n. 47), at pp. 161-4; Wolf, *US East-West Trade Policy: Economic Warfare versus Economic Welfare* (1973), pp. 47-51; and Mastanduno, 'Trade as a Strategic Weapon: American and Alliance Export Control Policy in the Early Postwar Period', *International Organization*, 42(1988), p. 121.

⁹² UN Doc. A/C.2/137 (1948). For the debates in the Second Committee of the UN General Assembly on this draft resolution, see generally *General Assembly Official Records*, 3rd Session, 2nd Committee, meetings 71-6, at pp. 185-278 (1948).

⁹³ 10 USC §2432 (1980).

⁹⁴ *Digest of US Practice in International Law*, 1975, p. 538. On the Jackson-Vanik amendment generally, and the Soviet Union's reaction thereto, see Caldwell, *American-Soviet Relations from 1947 to the Nixon-Kissinger Grand Design* (1981), pp. 190-8; Kissinger, *Years of Upheaval* (1982), pp. 246-55, 985-98; Orbach, *The American Movement to Aid Soviet Jews* (1979), pp. 129-54; Parrott, *op. cit.* above (n. 63), at pp. 259-65; Zaslavsky and Brym, *Soviet-Jewish Emigration and Soviet Nationality Policy* (1983), pp. 64-9; and Korey, 'Rescuing Soviet Jewry: Two Episodes Compared', *Soviet Jewish Affairs*, 5 (1975), part 1, p. 3.

⁹⁵ *Security Council Official Records*, 40th Session, 2578th meeting, at p. 26, UN Doc. S/PV.2578 (1985).

⁹⁶ *Ibid.*, at p. 27.

⁹⁷ *Ibid.*, at p. 28.

UN Charter, as well as of the General Assembly's Declaration on Friendly Relations between States of 1970.⁹⁸

On the whole, then, it may be concluded that the socialist countries are in substantial agreement with the Western ones on the existence of a norm of non-discrimination in economic relations, although it is certainly true that the conceptual bases of this principle are quite different in the eyes of the two groups. The Western concept is ultimately economic in character, in the sense that it derives (as discussed in the previous section) from the theories and insights of the classical political economists of the eighteenth and nineteenth centuries. The socialist conception, in contrast, is essentially juridical in nature; that is to say, it is largely independent of any particular set of economic doctrines and is designed, instead, to reinforce the sovereign rights of individual States to choose whatever economic system they wish. Despite this important difference, however, the logical implication of the socialist position, as of the Western one, is clear: that the waging of economic warfare for political purposes is impermissible.

IV. THE THIRD WORLD: 'ECONOMIC COERCION' AND THE 'NEW INTERNATIONAL ECONOMIC ORDER'

Of the three principal blocs of States, the developing countries have been by far the most forthright in their condemnation of economic warfare. The bases of their objection to the practice differ in a number of respects from those of both the Western and the socialist States. At the same time, however, there are significant points of contact.

The Third-World countries, like the socialist ones, show no sign of adhering to ideas of international 'solidarity' based upon liberal, *laissez-faire* economic principles.⁹⁹ Instead, they echo the socialist countries in their powerful emphasis on the sovereign right of each individual State to decide for itself what kind of domestic economic, social and political order it will adopt, free from coercion by other States. To that end, they endorse, like the socialist countries, a principle of non-discrimination designed to safeguard that sovereign right. Article 4 of the Charter of Economic Rights and Duties of States of 1974, for example, provides, to this end:

Every State has the right to engage in international trade and other forms of economic co-operation irrespective of any differences in political, economic and

⁹⁸ *Security Council Official Records*, 40th Session, 2579th meeting, at p. 21, UN Doc. S/PV.2579 (1985). On the Declaration on Friendly Relations between States, see the text at nn. 111 and 114, below.

⁹⁹ On this subject, see generally Krasner, *Structural Conflict: The Third World against Global Liberalism* (1985).

social systems. No State shall be subjected to discrimination of any kind based solely on such differences . . . ¹⁰⁰

At the same time, the Third-World countries share one important characteristic with the Western States: their opposition to economic warfare is a function of a broad, comprehensive programme for the ordering of international economic relations generally. It is true that this programme, known as the 'new international economic order', is quite different both in character and in detail from the Western liberal one. Nevertheless, as will be discussed presently, there is a certain bond between them at a very general level in that both strongly stress the importance of ever-increasing economic interdependence among States. The 'new international economic order' is therefore, in its own way, a programme of international 'solidarity', albeit of a distinctly Third-World cast.¹⁰¹

Finally, it may be noted at the outset that there is one significant respect in which the Third-World position differs from both the Western and the socialist one: that is, that the developing countries forcefully reject the idea that political and economic relations can be or should be kept rigorously separate from one another. The 'new international economic order', by its nature, is clearly an attempt on the part of the developing States to harness their political strength in the UN General Assembly and elsewhere for the transformation of the system of international economic relations. The general thrust of this programme, speaking very broadly, is to bring about a redistribution of global wealth in favour of the developing States. It may be added that the Third World countries have tended to couch their programme in distinctly juridical terms, most notably (for present purposes) in the form of the doctrine of permanent sovereignty over natural resources and of the Charter of Economic Rights and Duties of States of 1974.¹⁰²

The campaign by the developing countries for an express prohibition against economic warfare has advanced on, broadly speaking, two fronts, one of which has borne considerably more fruit than the other. One strategy, which has been largely unsuccessful, has been to attempt to subsume

¹⁰⁰ GA Res. 3281 (XXIX), *General Assembly Official Records*, 29th Session, Supplement No. 31, at p. 50, UN Doc. A/9631 (1974). See the text at n. 128, below, on the role of the Charter in the debate over the legality of economic warfare.

¹⁰¹ For the more or less definitive catalogue of Third-World ambitions in the sphere of international economic relations, see the Programme of Action on the Establishment of a New International Economic Order, GA Res. 3202 (S-VI), *General Assembly Official Records*, 6th Special Session, Supplement No. 1, at p. 5, UN Doc. A/9559 (1974). For a tiny part of the vast literature on the 'new international economic order', see Hart, *The New International Economic Order: Conflict and Co-operation in North-South Economic Relations*, 1974-77 (1983); and Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980).

¹⁰² For the text of the Declaration on Permanent Sovereignty over Natural Resources, see GA Res. 1803 (XVII), *General Assembly Official Records*, 17th Session, Supplement No. 17, at p. 15, UN Doc. A/5217 (1962). See the text at n. 119, below, on the significance of the principle for the debate over the legality of economic warfare. For the text of the Charter of Economic Rights and Duties of States, see n. 100, above. See the text at n. 128, below, on the significance of the Charter for the debate over the legality of economic warfare.

economic warfare under such categories of traditional international law as aggression, force and non-intervention—principles germane to the area of political relations between States. The other, more successful, approach has been to justify the prohibiting of economic warfare as necessary for the effective safeguarding of certain rights in the economic sphere—in particular, the right to nationalize foreign-owned property, under the juridical rubric of the principle of permanent sovereignty over natural resources. We shall look briefly at each of these strategies in turn.

The first approach, of attempting to include economic warfare within such relatively familiar legal categories as aggression and, more particularly, force, has proved largely unsuccessful because of the consistent opposition of the Western countries. (The socialist countries, in contrast, have given passive—but only passive—support to the developing States in this area.)¹⁰³ The developed Western States have steadfastly opposed what they regard as the distortion of rules of law designed basically to deal with direct, armed force, preferring instead the strategy (as outlined above) of effecting a general separation of questions of economic relations from political ones.¹⁰⁴ The Western attitude in this regard manifested itself as early as the San Francisco Conference of 1945, which drafted the UN Charter. A proposal by Brazil for an express prohibition against the use by States of 'economic measures' inconsistent with the Charter was overwhelmingly rejected.¹⁰⁵ Nor has there been any significant change in the Western States' attitude on this point since then, even when they themselves have been the victims of acts of economic warfare. During the Arab oil embargo of 1973–4, for example, the Western States, which were the principal targets of it, made no real attempt to attack the embargo as a violation of the UN Charter (although some Western writers did).¹⁰⁶

¹⁰³ See n. 64, above.

¹⁰⁴ See the text at n. 51, above. For a useful summary of the views of the various groups of States in this general area, as expressed in the debates in the UN in the early 1950s on the subject of aggression, see Report by the Secretary-General, *General Assembly Official Records*, 7th Session, Annexes (Agenda Item 54), at pp. 17, 74–5, UN Doc. A/2211 (1952). See also Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (1958), pp. 58–61, 66–8.

¹⁰⁵ Doc. 784, I/1/27, *UNCIO Documents* (1945), vol. 6, pp. 334–5. The reason for the rejection of the Brazilian proposal is by no means clear from the record, although the vote was certainly extremely lopsided (26–2). In the course of the debates, the Belgian delegate put forward the view that Brazil's concern about the use of economic pressure was met by the general proviso that force should not be used in 'any . . . manner inconsistent with the Purposes of the United Nations'. The most reasonable interpretation would appear to be that the Brazilian amendment was rejected on the ground that Article 2(4), as drafted, does forbid the use of economic warfare if—but only if—the measures in question are substantially equivalent to a use of military force of the kind clearly forbidden by the article. For an interpretation of Article 2(4) to this effect, see the text at n. 116, below.

¹⁰⁶ See, for example, Buchheit, 'The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations', *University of Pennsylvania Law Review*, 122 (1974), p. 983; Paust and Blaustein, 'The Arab Oil Weapon—A Threat to International Peace', *American Journal of International Law*, 68(1974), p. 410; and Paust and Blaustein, 'The Arab Oil Weapon: A Reply and Reaffirmation of Illegality', *Columbia Journal of Transnational Law*, 15(1976), p. 57. It would appear that the victims of the oil embargo would have had a valid claim against the one Arab oil State (Kuwait) which was a party to the GATT, but no attempt was made to raise the matter in GATT.

In general, whenever the States of the world have approached questions in this area from the standpoint of consensus, the firm Western stand has prevented the expansion of the concepts of aggression and force to include economic warfare. The consensus definition of aggression, for example, formulated in 1974 by the UN General Assembly, was confined to the use of direct, armed aggression for that reason.¹⁰⁷ The same has been true of rules relating to the use of force. At the Vienna Conference on the Law of Treaties in 1968–9, for example, the developing countries sought to amend the provision stating that treaties procured by the use of force were void, so as to state expressly that the use of economic pressure was included therein.¹⁰⁸ The International Law Commission of the UN had previously discussed that very issue and concluded that it was best simply to have a general statement concerning the use of force and to refrain from specifying one way or the other whether economic warfare fell into that category.¹⁰⁹ At the Vienna Conference, that same approach was adopted. In the interest of consensus, the developing countries were persuaded to drop their proposed amendment and to rest content, instead, with a side declaration by the conference condemning the threat or use of ‘pressure in any form’, including economic, in the inducing of treaties.¹¹⁰ Similarly, in the debates leading to the adoption by the UN General Assembly of the Declaration on Friendly Relations between States of 1970, which included a section dealing with the

¹⁰⁷ GA Res. 3314 (XXIX), *General Assembly Official Records*, 29th Session, Supplement No. 31, at p. 142, UN Doc. A/9631 (1974). For the decision to omit any reference to the use of economic pressure in the definition, in the interest of preserving a consensus behind the definition as it ultimately emerged, see Report of the Special Committee on the Question of Defining Aggression, *General Assembly Official Records*, 24th Session, Supplement No. 20, at p. 15, UN Doc. A/7620 (1969).

¹⁰⁸ *United Nations Conference on the Law of Treaties: First Session, Vienna, 26 March–24 May 1968: Official Records. Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, pp. 269–70, UN Doc. A/Conf. 39/11 (1969).

¹⁰⁹ Report of the International Law Commission on the Work of its 18th Session, *General Assembly Official Records*, 21st Session, Supplement No. 9, UN Doc. A/6309/Rev. 1 (1966), reprinted in *Yearbook of the International Law Commission*, 1966, vol. 2, pp. 172, 246, UN Doc. A/CN.4/SER.A/1966/Add.1 (1966). On the debate within the Commission on the subject, see Malawer, ‘A New Concept of Consent and World Public Order: “Coerced Treaties” and the Convention on the Law of Treaties’, *Vanderbilt Journal of Transnational Law*, 4(1970), p. 1 at pp. 22–5; and Murphy, ‘Economic Duress and Unequal Treaties’, *Virginia Journal of International Law*, 11(1970), p. 51 at pp. 54–7. Critical of this approach to the question, on the ground that it avoids the crucial issue, is Stone, *Of Law and Nations: between Power Politics and Human Hopes* (1974), pp. 231–51.

¹¹⁰ ‘Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties’, Final Act of the UN Conference on the Law of Treaties, UN Doc. A/Conf. 39/26 (1969), in *United Nations Conference on the Law of Treaties: Official Records. Documents of the Conference*, p. 285, UN Doc. A/Conf. 39/11/Add. 2 (1971). On the debate at the Vienna Conference on the subject of economic pressure as force, see Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn., 1984), pp. 177–9; Elias, ‘Problems concerning the Validity of Treaties’, *Recueil des cours*, 134(1971–III), p. 333 at pp. 383–7; Malawer, loc. cit. (previous note), at pp. 16–25; id., ‘Imposed Treaties and International Law’, *California Western International Law Journal*, 7(1977), p. 1 at pp. 129–36. For a very good general survey of the status of economic warfare under the Vienna Convention on the Law of Treaties, see Partridge, Jr, ‘Political and Economic Coercion: Within the Ambit of Article 52 of the Convention on the Law of Treaties?’, *International Lawyer*, 5(1971), p. 755.

use of force, the Western countries successfully held out against the express inclusion of economic warfare in that category.¹¹¹

The only real success which the developing States have achieved in this area has been in the association of economic warfare with intervention, in the UN General Assembly's Declaration on Non-intervention of 1965.¹¹² That declaration forbids, *inter alia*, 'the use of economic . . . measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind'. Even here, the triumph was less complete than appears. This resolution was pushed through the General Assembly in what some developed States expressly regarded as inadvisable haste.¹¹³ Many Western countries proceeded to object strenuously when the declaration was incorporated into the Declaration on Friendly Relations, precisely because of the lack of extensive deliberation in the drafting of it.¹¹⁴

One final remark may be made concerning this general strategy by the Third-World countries to prohibit economic warfare. The persistent opposition of the Western countries to importing that concept expressly into the sphere of political relations between States only means that economic warfare cannot be considered *automatically* to amount to a use of force or to

¹¹¹ For the text of the declaration, see GA Res. 2625 (XXV), *General Assembly Official Records*, 25th Session, Supplement No. 28, at p. 121, UN Doc. A/8028 (1970). There is no significant body of secondary literature in English on the drafting of the declaration. For a representative sample of the debate on the issue of economic warfare, see Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, *General Assembly Official Records*, 20th Session, Annexes (Agenda Items 90 and 94), at pp. 88–90, UN Doc. A/5746 (1964).

¹¹² GA Res. 2131 (XX), *General Assembly Official Records*, 20th Session, Supplement No. 14, at p. 11, UN Doc. A/6014 (1965). This formulation was substantially borrowed from Article 19 (as it now is) of the Charter of the Organization of American States (OAS), 30 April 1948, *United Nations Treaty Series*, vol. 119, p. 3, which provides that '[n]o State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind'. Similar wording, though without the final phrase, was used in the Charter of Economic Rights and Duties of States in 1974: see the text at n. 130, below. Similar wording also appears in the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, adopted by the UN General Assembly in 1987: GA Res. 42/22, *General Assembly Official Records*, 42nd Session, Supplement No. 49, at p. 287, UN Doc. A/42/49 (1987). (This declaration was adopted in lieu of the Soviet Union's proposed international convention on the subject, referred to in n. 64 above.)

¹¹³ See, for example, the remarks made by the UK, France, New Zealand, Canada, Italy and Sweden, in explanation of their votes on the declaration in the First Committee of the General Assembly: *General Assembly Official Records*, 20th Session, 1st Committee, 1422nd meeting, at pp. 430–4, UN Doc. A/C.1/SR.1422 (1965).

¹¹⁴ See Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, *General Assembly Official Records*, 21st Session, Annexes (Agenda Item 87), at pp. 73–4, UN Doc. A/6230 (1966). There would appear to be no account in English of the cloudy history of the drafting of this resolution and of its incorporation into the Declaration on Friendly Relations between States. That is unfortunate, considering the importance which may come to be attached to it in the future, as a consequence of references to it by the International Court in *Nicaragua v. US*, loc. cit. above (n. 2), at p. 107, para. 203. On the subject of economic warfare and intervention generally, see Bryde, 'Die Intervention mit wirtschaftlichen Mitteln', in von Münch (ed.), *Staatsrecht—Völkerrecht—Europarecht: Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28 März 1981* (1981), at p. 227.

aggression, as the developing countries have contended.¹¹⁵ It still remains possible, however, that, in particular (and probably extremely rare) instances, measures of economic warfare might attain such a level of severity as functionally to constitute a use of force.¹¹⁶ There is no judicial authority to this effect. But there would appear to be no reason to hold dogmatically that economic warfare could *never* amount to a use of force or to aggression. The conclusion is only that it does not necessarily do so. In addition, it should be recalled that the authority of the UN Security Council to determine the existence (under Article 39 of the UN Charter) of a threat to the peace, a breach of the peace or an act of aggression is extremely broad—easily broad enough to encompass, in particular (and probably rare) instances, cases of economic warfare.¹¹⁷ Nevertheless, the basic conclusion remains valid that the rules of international law relating to force and aggression are not the place to look for a *general* customary-law prohibition against economic warfare.

¹¹⁵ The majority view among writers is that Article 2(4) of the UN Charter does not encompass economic warfare, at least not in the general case. See, to this effect, for example, Bowett, *Self-Defence in International Law* (1958), p. 148; Brownlie, *International Law and the Use of Force by States* (1963), pp. 361–2; Goodrich and Hambro, *The Charter of the United Nations: Commentary and Documents* (2nd edn., 1949), p. 104; Kelsen, *Principles of International Law* (2nd edn., 1966, ed. Tucker), pp. 84–7; Oppenheim, *International Law: A Treatise*, vol. 2 (7th edn., 1952, ed. Lauterpacht), p. 153; Bilder, 'Comments on the Legality of the Arab Boycott', *Texas International Law Journal*, 12(1977), p. 41; Dubois, 'L'Embargo dans la pratique contemporaine', *Annuaire français de droit international*, 13(1967), p. 99 at pp. 109–10; Dicke, loc. cit. above (n. 9); Farer, loc. cit. above (n. 3); Kausch, loc. cit. above (n. 3); Kunz, 'Sanctions in International Law', *American Journal of International Law*, 54(1960), p. 324 at pp. 331–2; Leben, 'Les Contre-mesures inter-étatiques at les sanctions à l'illicéité dans la société internationale', *Annuaire français de droit international*, 28(1982), p. 9 at p. 67; Lillich, 'The Status of Economic Coercion under International Law: United Nations Norms', *Texas International Law Journal*, 12(1977), p. 17 at pp. 18–19; Sørensen, 'Principes de droit international public', *Recueil des cours*, 101(1961–III), p. 1 at pp. 236–7; and Waldock, 'The Regulation of the Use of Force by Individual States in International Law', *ibid.* 81(1952–II), p. 451 at pp. 492–4.

There are, of course, dissenters. See, for example, Cilliers, 'Economic Coercion and South Africa, Part II: The Legality of International Economic Coercion', *South African Yearbook of International Law*, 3(1977), p. 126 at pp. 130–1; and Zedalis, 'Some Thoughts on the United Nations Charter and the Use of Military Force against Economic Coercion', *Tulsa Law Journal*, 17 (1982), p. 487. See also the writers cited in n. 106, above.

For a convenient collection of writings on this general subject, see generally Lillich, *op. cit.* above (n. 9).

¹¹⁶ Among the writers endorsing this approach are McDougal and Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), pp. 190–6; Bilder, loc. cit. above (previous note), at p. 44; Brosche, 'The Arab Oil Embargo and United States Pressure against Chile: Economic and Political Coercion and the Charter of the United Nations', *Case Western Reserve Journal of International Law*, 7(1974), p. 3 at p. 34; Farer, loc. cit. above (n. 3), at pp. 411–13; Muir, 'The Boycott in International Law', *Journal of International Law and Economics*, 9(1974), p. 187 at pp. 202–4. For interesting illustrations of US cases which have adopted this general approach (in the context of deciding whether 'persecution' can encompass economic pressure or not), see *Dunat v. Hurney*, 297 F 2d 744 (3d Cir. 1962); *Diminich v. Esperdy*, 299 F 2d 244 (2d Cir. 1961), cert. denied 369 US 844 (1962); and *Soric v. Flagg*, 303 F 2d 289 (7th Cir. 1962). The focus of the present discussion is not on the question of whether economic warfare does or can constitute a use of force, but rather on the more general question of whether it can be said to constitute a violation of customary international law on *any* basis.

¹¹⁷ On the power of the Security Council in this regard, see Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis* (1985), pp. 163–76; and McDougal and Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern', *American Journal of International Law*, 62(1968), p. 1.

The Third-World countries have achieved by far the greater success in their other approach to the banning of economic warfare: arguing that such a prohibition is necessary to ensure that the exercise of certain other rights in the economic sphere, most notably that of nationalization, is fully safeguarded from retaliation by other (i.e., developed) States. In this respect, the developing countries' campaign against economic warfare has constituted one part of a much broader effort, summed up in the programme for a 'new international economic order', to redistribute the wealth of the world by a vast array of mechanisms—for example, reform of the international monetary system, increased technology transfer to developing countries, tariff preferences for Third-World States, the exploitation of the deep seabed for the benefit of developing countries and so forth. For present purposes, the most important part of the programme is the oldest one: the assertion of the right to nationalize property. This right forms a part (and a very important one) of the more general principle of permanent sovereignty over natural resources.

An important component of the developing countries' strategy in asserting this right of nationalization has been to insure against economic retaliation on the part of the developed States affected by it. There had been two earlier nationalization incidents in particular in which the countries affected had taken such measures (although with little real impact): the US in the case of the oil company nationalizations by Mexico in 1938, and the UK in the case of the Iranian oil nationalization of 1951.¹¹⁸ These incidents were no doubt in the minds of the Latin-American States which sponsored the first resolution on the right of permanent sovereignty over natural resources in the UN General Assembly in 1952.¹¹⁹ On that occasion, Bolivia proposed that the resolution include a provision that States should refrain from resorting to 'political or economic intervention' to undermine this posited right.¹²⁰ In the event, the resolution included only a much more opaque admonition to States to refrain from 'acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources'.¹²¹ The significance of this early incident lies in the way that it reveals the fundamentally defensive character of the developing countries'

¹¹⁸ On the US response to the Mexican nationalizations, see generally Chester, *United States Oil Policy and Diplomacy: A Twentieth Century Overview* (1983), pp. 123–32; Krasner, *Defending the National Interest: Raw Materials Investments and US Foreign Policy* (1978), pp. 181–5; Everest, *Morgenthau, the New Deal and Silver: A Story of Power* (1950), pp. 88–97; Philip, *Oil and Politics in Latin America: Nationalist Movements and State Companies* (1982), pp. 201–26; and Koppes, 'The Good Neighbor Policy and the Nationalization of Mexican Oil', *Journal of American History*, 69(1982), p. 62. On the measures taken by the UK against Iran, see Ford, *The Anglo-Iranian Dispute of 1951–1952: A Study of the Role of Law in the Relations of States* (1954), pp. 119–20; and Krasner, op. cit. above (this note), at pp. 119–21.

¹¹⁹ GA Res. 626 (VII), *General Assembly Official Records*, 7th Session, Supplement No. 20, at p. 18, UN Doc. A/2631 (1952).

¹²⁰ UN Doc. A/C.2/L.166 (1952), reprinted in *General Assembly Official Records*, 7th Session, Annexes (Agenda Item 25), at p. 7.

¹²¹ See n. 119, above.

opposition to economic warfare—a character which it has retained to the present day.

With the passage of time, the connection has become ever clearer between, on the one hand, the abstract-sounding concept of permanent sovereignty over natural resources, and, on the other hand, the more concrete desire by the Third World States to resort to nationalization of foreign-owned property as one means of redistribution of global wealth. The UN General Assembly's principal pronouncement on the subject in 1962, for example, expressly linked the two ideas.¹²² In this way, the opposition to economic warfare also came to be intimately bound up with the emotive and controversial question of nationalization. Nowhere was this fact more apparent than in the case of the Chilean copper nationalizations of 1971, to which the US responded by imposing a number of economic measures against Chile (consisting chiefly of reductions of foreign aid and attempts to reduce the flow of capital to the country).¹²³ The Chilean affair became something of a *cause célèbre*, giving rise to a new assertiveness on the part of the developing States—including an increased willingness to make an explicit connection between the right of nationalization, and the prohibition of economic measures designed to impede it. Symptomatic of this new assertiveness was the statement in the Declaration of Lima of 1971, in which the developing States proclaimed that:

Every country has the sovereign right freely to dispose of its natural resources in the interests of the economic development and well-being of its own people; any external political or economic measures or pressures brought to bear on the exercise of this right is a flagrant violation of the principles of self-determination of peoples and of non-intervention, as set forth in the Charter of the United Nations and, if pursued, could constitute a threat to international peace and security.¹²⁴

In the 1980s, Nicaragua replaced Chile as the centre of Third-World attention on the subject of economic warfare, with the US still playing the warrior's role. The focus was not, in this case, on nationalization. But it was now more clear than ever that a major concern of the developing States in this area has been the promotion of their own class interest (so to speak) rather than of a global 'mercantile republic' in the Western liberal image. At the 1983 session of the UN Conference on Trade and Development (UNCTAD), a resolution was adopted at the behest of the developing

¹²² GA Res. 1803 (XVII), loc. cit. above (n. 102). For a minute portion of the immense literature on the subject of permanent sovereignty over natural resources, see Hossain and Chowdhury (eds.), *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (1984); Rosenberg, *Le Principe de souveraineté des états sur leurs ressources naturelles* (1983); and Elian, 'Le Principe de la souveraineté sur les ressources nationales et ses incidences juridiques sur le commerce international', *Recueil des cours*, 149(1976-I), p. 1.

¹²³ On the US measures against Chile at this time, see Krasner, op. cit. above (n. 118), at pp. 298–312.

¹²⁴ The Declaration and Principles of the Action Programme of Lima, *Proceedings of the United Nations Conference on Trade and Development, Third Session, Santiago de Chile, 13 April to 21 May 1972: Report and Annexes*, vol. 1, pp. 373, 376, UN Doc. TD/180, vol. 1 (1973).

States, to the effect that 'all *developed* countries shall refrain from applying trade restrictions, blockades, embargoes and other economic sanctions . . . against *developing* countries as a form of political coercion which affects their economic, political and social development'¹²⁵ (emphasis added). The spirit of consensus was conspicuously lacking. Nineteen States voted against this measure, while a further seven abstained. In explaining their lack of support, Spain, the US, the EEC, Switzerland, Japan, Austria, Israel and Portugal objected to the one-sided and partisan nature of the resolution.¹²⁶ Undaunted, the developing States proceeded to sponsor substantially identical resolutions in the UN General Assembly later that year and then in subsequent ones as well.¹²⁷

Nowhere has the real nature of the Third World's position on international economic relations in general (including economic warfare) been more starkly clear than in the Charter of Economic Rights and Duties of States, adopted by the UN General Assembly in 1974.¹²⁸ It is readily apparent from this document that the developing States' concern in the area of economic relations is in fact strongly political in character. Furthermore, the legal principles which they espouse are, in certain respects, distinctly conservative and traditional. In the list of the 'Fundamentals of International Economic Relations', for example, the first principle listed is 'Sovereignty, territorial integrity and political independence of States'. Next comes 'Sovereign equality of all States'. Among the other fundamentals are such matters as non-aggression, non-intervention, peaceful co-existence and peaceful settlement of disputes. Significantly, the removal of barriers to trade does not figure on this list. Nor does the concept of non-discrimination in economic relations (although, as noted above, there is a

¹²⁵ UNCTAD Res. 152 (VI), *Proceedings of the United Nations Conference on Trade and Development, Sixth Session, Belgrade, 6 June–2 July 1983*, vol. 1, at p. 37, UN Doc. TD/326, vol. 1 (1983).

¹²⁶ *Ibid.*, at pp. 84–9. Greece, on behalf of the EEC States, expressed regret that a matter of this kind, which was 'of a clearly political nature', was being put forward in UNCTAD, a body designed to deal with economic questions: *ibid.*, at pp. 85–6. This statement was clearly a reflection of the general and long-standing preference of the Western countries for dealing with political and economic questions separately—a strategy which (as we have seen) does not amount to contending that economic warfare is lawful. See the text at n. 52, above, on this point. For example, Spain, Sweden and Austria, all of which abstained on the resolution, nevertheless stated their opposition in principle to the practice of economic warfare, as did Portugal, which voted against it: *ibid.*, at pp. 84–5, 88–9.

¹²⁷ See GA Res. 38/197, *General Assembly Official Records*, 38th Session, Supplement No. 47, at p. 153, UN Doc. A/38/47 (1983); GA Res. 39/210, *General Assembly Official Records*, 39th Session, Supplement No. 51, at p. 160, UN Doc. A/39/51 (1984); GA Res. 40/185, *General Assembly Official Records*, 40th Session, Supplement No. 53, at p. 146, UN Doc. A/40/53 (1985); GA Res. 41/165, *General Assembly Official Records*, 41st Session, Supplement No. 53, at p. 131, UN Doc. A/41/53 (1986); and GA Res. 42/173, *General Assembly Official Records*, 42nd Session, Supplement No. 49, at p. 130, UN Doc. A/42/49 (1987).

¹²⁸ See n. 100, above. On the Charter generally, see Meagher, *An International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States* (1979); Stemberg, *Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten* (1983); Feuer, 'Réflexions sur la charte des devoirs économiques des états', *Revue générale de droit international public*, 79(1975), p. 273; and Weston, 'The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-owned Wealth', *American Journal of International Law*, 75(1981), p. 437.

provision to that effect in the body of articles of the Charter).¹²⁹ Nor does the concern for promoting the growth or development of the world economy as a whole. International co-operation is listed among the fundamentals, but only for the purpose of 'development'.

The detailed body of rights and duties in the Charter is in keeping with the fundamentals. Article 1 provides for the right of each State to choose its own economic system 'without outside interference, coercion or threat in any form whatsoever'. Article 2 states the principle of permanent sovereignty over natural resources, expressly linking it with the right of nationalization. Even Article 14, which sets out the duty of States 'to co-operate in promoting a steady and increasing expansion and liberalization of world trade' is directed towards the particular interests of the developing countries, and not towards the promotion of a Western liberal-style open-door trade regime.

It is in this general framework that the provision on economic warfare must be seen. Article 32 of the Charter provides that 'no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights'. The thrust of this provision, as of the Charter as a whole, is towards the protection of the sovereign rights of the developing States from economic measures that the developed countries might bring to bear on them. For that reason, the developed States were distinctly cool towards this provision of the Charter. When Article 32 was put to a vote in the Second Committee of the General Assembly, almost all of the developed Western countries (plus Japan) abstained.¹³⁰

Several final observations are in order concerning the Third-World position on the question of the permissibility of economic warfare. For one thing, it is certainly true that, of the three principal groups of States, the developing countries have been the most forthright, even aggressive, in their condemnation of the practice. At the same time, there has been a certain narrowness of scope in their position. Their strident opposition to economic warfare has not been based on the concept of non-discrimination, which by its nature is essentially universalist in its thrust. Instead, they have based it upon the desire to defend their class interests (so to speak) against infringement by the developed countries. There has never been any clear suggestion on the part of the developing countries, for example, that it would be unlawful for them to use such economic power as they might chance to possess against the developed States. It is interesting to note in this connection that, during the Arab oil embargo in 1973, the developing countries were sponsoring a resolution in the UN General Assembly on the subject of permanent sovereignty over natural resources which contained

¹²⁹ See the text at n. 100, above.

¹³⁰ *General Assembly Official Records*, 29th Session, Annexes (Agenda Item 48), at p. 25, UN Doc. A/9946 (1974).

an express condemnation of the use of the economic pressure by States.¹³¹ The Arab oil States supported the resolution—without, apparently, any sense of incongruity.

It would be a great error, however, to ignore certain other important aspects of the Third-World position. As different as the Western and the Third-World views on the subject are, they do nevertheless share certain broad common tendencies. Chief among these is the general emphasis on the need to strengthen international economic co-operation among States (even though this co-operation is directed towards quite different ends in the eyes of the two groups). To this effect, the UN General Assembly's Declaration on the Establishment of a New International Economic Order of 1974 states that

the interests of the developed countries and those of the developing countries can no longer be isolated from each other, that there is a close interrelationship between the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts.¹³²

The Third-World programme for a 'new international economic order' is, then, profoundly ambivalent in nature. On the one hand it is conservative (if not reactionary) in its emphasis on the sovereign rights and independence of individual States.¹³³ At the same time, however, it is boldly reformist in its pursuit of an ideal of transnational economic justice, and in particular in its over-all stress on the need to fashion a variety of resource-transferring mechanisms to bring about a greater equality of wealth among nations. The 'new international economic order'—and the opposition to economic warfare which springs from it—therefore shares something of the cosmopolitan and humanitarian spirit of the ideal of 'solidarity', even while differing greatly in its specific formulations. In this sense, the opposition of the developing countries, like that of the Western States, is rooted in the ever-increasing economic interdependence of countries in the modern world.

V. POSSIBLE CONCLUSIONS

The basic dilemma which emerges from the foregoing discussion may be summed up quite simply. The three major blocs of States may fairly be said

¹³¹ GA Res. 3171 (XXVIII), *General Assembly Official Records*, 28th Session, Supplement No. 30, at p. 52, UN Doc. A/9030 (1973).

¹³² GA Res. 3201 (S-VI), *General Assembly Official Records*, 6th Special Session, Supplement No. 1, at p. 3, UN Doc. A/9559 (1974).

¹³³ On the economic nationalist nature of much of the Third-World programme, see generally Burnell, *Economic Nationalism in the Third World* (1986).

to agree on the general proposition that economic warfare is impermissible but to disagree on the reasons for so holding. The remaining problem, therefore, is to assess the significance of this state of affairs. In short, is it justifiable to conclude that there is now a rule of customary international law forbidding States, in principle at least, to wage economic warfare?

There is much to be said in favour of a negative response to this query. It can readily be argued that, in the light of the differences in approach to the question of economic warfare by the three principal blocs of States, the degree of consensus necessary to sustain a rule of customary international law is absent in this case. The absence of a significant body of literature in support of a general prohibition against economic warfare would be another argument in support of the view that no such prohibition exists.¹³⁴ In addition, there is the consideration that this line of reasoning still allows for the regulation of economic warfare in the extreme cases where it really matters—i.e., when it constitutes a threat to the peace under Article 39 of the UN Charter, and when it is so serious in its effects as to amount to a use of force under Article 2(4).¹³⁵ Apart from such extreme cases, it may be argued that there is no urgent need for the law to restrict acts of economic warfare.

These are weighty arguments—so much so that it is probably safe to say that they represent the majority view of international lawyers at the present time. There is, however, a case to be made for the opposite conclusion. It is possible, on the basis of the foregoing discussion, to discern some common threads running through the positions of the three groups of States on this issue. The question—on which there will inevitably be scope for differences of opinion—is whether any of these threads is strong enough to support a rule of customary international law. One such common theme is the idea that discrimination on political grounds in international economic relations is, in principle at least, impermissible. There is, however, a serious problem in this regard with the Third-World countries. That is, that they have not based their firm opposition to economic warfare upon this concept to anything like the extent that the other two blocs have. Instead, as observed above, their opposition to economic warfare has arisen from their general programme to effect a redistribution of global economic resources in their favour. This fact gives rise to a paradox. If a rule of law prohibiting economic warfare is to be rooted in the concept of non-discrimination, then most of the express pronouncements on the subject (i.e., those sponsored

¹³⁴ For a particularly vigorous denial that there is any rule of international law prohibiting economic warfare in the general case, see Farer, *loc. cit.* above (n. 3). For a rare example of an international lawyer expressly holding that economic warfare is in general unlawful, see Bassiouni, 'The Arab Boycott of Israel and US Policy to Counteract it', in Bassiouni, Cleute and McCarthy, *Boycott and Anti-boycott: Implications in Arab-US Relations* (1986), p. 1 at p. 2. (It is interesting to note, however, that this latter author makes this general claim of illegality in the course of justifying the legality of the Arab boycott of Israel as a belligerent measure, i.e., as an exception to the general rule which he posits.)

¹³⁵ See the text at n. 116, above.

by the developing countries) will have to be discounted, because they have been based on other grounds.

At first glance, it must certainly seem extremely odd to hold that there is now a rule of customary international law forbidding the waging of economic warfare, while at the very same time dismissing as irrelevant virtually every express pronouncement to that effect. To many—and probably a majority—of lawyers, this justification for a rule prohibiting economic warfare will accordingly be found to be unconvincing. It should be appreciated, though, that this approach is less odd than it might appear initially. If the intention is to base a prohibition against economic warfare on the existence of a general rule forbidding discrimination on political grounds in international economic relations, then the only question is whether there is or is not sufficient evidence for the existence of such a principle. The fact that one group of States might condemn economic warfare on some extraneous ground is substantially irrelevant. As the discussion above has indicated, a case can be made that all three of the major groups of States do endorse such a principle of non-discrimination (although, to be sure, with different ends in mind).

It may also be noted that underlying the concept of non-discrimination in economic relations are certain more general ideas to which, again, it may fairly be concluded that all three groups of States subscribe. These may be summed up by the general—admittedly *very* general—proposition that in their international economic relations, States should adhere to a higher standard of good-neighbourly conduct than in their political relations. In the political sphere, the essential rule of conduct is the minimalist one of refraining from the threat or use of force, as prescribed by Article 2(4) of the UN Charter. In the economic sphere, on the other hand, a more positive spirit of co-operation is to prevail. There, political differences are to be put aside, at least to an extent, in the general cause of the promotion of the prosperity of the international community generally.

Many—indeed, probably most—international lawyers will not be convinced by an argument pitched at so high a level of generality as this one. It will appear to many to have an unacceptably vague or utopian flavour. It might seem to imply dangerously, or unrealistically, far-reaching changes in the every-day conduct of States. These misgivings are certainly cogent, but one should be wary of exaggerating them. In particular, it should be stressed that, even if there was held to be a general prohibition against economic warfare, there would still be considerable scope for exceptionally resorting to the practice, as a form of reprisal (as in the case of the Chinese boycott against Japan in 1931).¹³⁶ Although it may be accepted that international law now forbids forcible reprisals, it continues to permit non-forcible ones, provided that they are designed (as reprisals must be, by

¹³⁶ See the text at n. 42, above.

definition) to counteract violations of the law on the part of their target.¹³⁷ Actions such as the US's freezing of Iranian assets at the time of the hostages crisis in 1979–81 would therefore continue to be permitted,¹³⁸ as would economic measures in opposition to human rights violations. The same could be said for economic measures taken against States sponsoring terrorism or narcotics smuggling. In such cases, there would be two crucial tests of the legality of the economic reprisals: first, whether the conduct to which they were a response was actually unlawful; and, secondly, whether the economic measures taken were reasonably proportionate to that wrongdoing. There will be much room for doubt in particular cases, of course. But the basic principle is clear enough, that exceptional measures of economic warfare will continue to be permitted *if* these tests can be met.

The real significance of this proposed rule of customary international law against economic warfare does not lie, therefore, in any radical change that it will compel in the day-to-day conduct of States. Rather, it lies in the way that it compels lawyers to concentrate on more general issues of international relations—in particular, on the question of whether a qualitatively different standard of conduct is or is not required of States in their economic relations, as distinct from their political ones. To this crucial question there is no authoritative answer as yet. Lawyers will divide into separate camps more on the basis of temperament or general philosophical outlook than of authority or precedent.

The fundamental division is likely to be between those who conceive of international law as being, by its nature, intrinsically political in character, in the sense of accepting the basic doctrine of Wolff and Vattel that the self-interest and will of the individual States are the bases of international law.¹³⁹ On this view, the essential function of the law is, accordingly, to ensure that the clashes of national self-interest which will inevitably occur do not cause undue disruption. To lawyers of this school (if it may be so called), the principal services which the law can perform for the international community will involve such matters as promoting the peaceful settlement of disputes, refining the law of treaties, regulating the conduct of war, resolving conflicts of State jurisdiction and so forth.

¹³⁷ On economic warfare and reprisals, see Bowett, 'Economic Coercion and Reprisals by States', *Virginia Journal of International Law*, 13(1972), p. 1. On reprisals generally in international law, see Partsch, 'Reprisals', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 9(1986), p. 330. On the more general subject of non-forcible countermeasures in international law, see Elagab, *The Legality of Non-forcible Counter-measures in International Law* (1988); Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984); and Leben, *op. cit.* above (n. 115).

¹³⁸ For doubts expressed on this point by two International Court Judges, see case concerning *US Diplomatic and Consular Staff in Tehran*, *ICJ Reports*, 1980, p. 3 at pp. 53–5, 63–4. The better argument, however, would appear to be in favour of the legality of the US economic measures on that occasion. See, to this effect, Schachter, 'International Law in the Hostage Crisis: Implications for Future Cases', in Kreisberg (ed.), *American Hostages in Iran: The Conduct of a Crisis* (1985), p. 325 at pp. 354–69.

¹³⁹ See, for a definition of international law as 'nothing more or less than a system of mutual restraints and reciprocal concessions that nations accept because it serves their interests to do so', Gardner, 'The Case for Practical Internationalism', *Foreign Affairs*, 66(1988), p. 827 at p. 841.

In the other camp are those lawyers who see international law as having, in addition, a broader and, in a sense, more positive role. On this view, law is not—or at least not exclusively—the product of the self-interest and will of States, as it was for Wolff and Vattel. Rather, it is a force which is designed to tame and restrict the unbridled pursuit of self-interest of States in favour of a more cosmopolitan outlook. It is a view of law which, in the field of economic relations, elevates the cause of human welfare (however that may be defined) above *realpolitik*.¹⁴⁰

There are few who would quarrel (at least openly) with this ideal as a matter of worthy aspiration. But there are many who will doubt whether it accurately sums up the state of international law at the present time. It is entirely possible that it does not. Nevertheless, this consideration of the more limited question of the legality of economic warfare and of the evolution of ideas about it through history reveals that there may be more support among States for views of this kind than many might initially have supposed. Vattel's pronouncement, therefore, may not (or not yet) have been overturned. But it is, at the very least, subject to some doubt.

¹⁴⁰ The sub-discipline of international law known as international economic law adopts this general approach in its concern with (broadly speaking) the subject of economic co-operation between States, in its myriad forms. See, for example, Carreau, Juillard and Flory, *Droit international économique* (2nd edn., 1980); Mukherjee, *Outstanding Issues in International Economic Law* (1985); Picone and Sacerdoti, *Diritto internazionale del economia* (1982); Tikiri and Kohana, *The Regulation of International Economic Relations through Law* (1985); Jackson, 'International Economic Law', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 8(1985), p. 149; Schwarzenberger, 'The Province and Standards of International Economic Law', *International Law Quarterly*, 2(1948), p. 402; and id., 'Les Principes et normes du droit économique international', *Recueil des cours*, 117(1966-I), p. 1.

SOLIDARITY AND BREACHES OF MULTILATERAL TREATIES*

By D.N. HUTCHINSON†

I. INTRODUCTION

It is commonly supposed that, when an obligation under a multilateral treaty falls to be performed, it is owed by the party on which it is incumbent either to one other party to that treaty or else to a limited number of the States parties. For example, faced on the high seas with a merchant vessel flying the flag of a State party to the Convention on the High Seas, 1958, another State party is under an obligation, laid down in Article 22(1), that its warships not board that vessel. The latter State owes this obligation either to just one of the other parties to the Convention—probably the State whose flag the merchant vessel flies—or else to a small number of them—the flag State, the State whose nationals own the vessel, the State whose nationals own the cargo, and so on—and this party or group of parties enjoys a correlative right to require that State to perform its obligation. What is not contemplated is that the naval State owes its obligation in respect of that particular merchant vessel to each and every one of the States which are party to the Geneva Convention.

Accompanying this assumption is its corollary: namely, that, if the naval State were to proceed to breach its obligation under Article 22 by ordering its warships to board the merchant vessel, the secondary, remedial rights which would then arise under international law would vest in only one, or else a few, of the parties to the Geneva Convention—namely, that State or those States to which the primary obligation breached is owed and which thus hold a correlative primary right to its performance.¹ That State or group of States would then enjoy the whole panoply of secondary, remedial rights provided by international law: the right to require the naval State to put an end to its breach and resume compliance with its obligation under

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¹ Applying the further common supposition that remedial rights vest in those States, and only those States, which are entitled to the performance of the obligation breached. See, for example, Article 5(1) of Part 2 of the International Law Commission's Draft Articles on State Responsibility, which the Commission provisionally adopted in 1985, together with paras. 2, 3 and 7 of the Commission's accompanying Commentary: *Yearbook of the International Law Commission*, 1985, vol. 2, part 2, pp. 25 and 26. Although this assumption is open to question, it will not be challenged here (though see n. 123 below).

For a brief explanation of the use of the terms 'primary' and 'secondary' to describe obligations and rights, see n. 6 below.

Article 22 by releasing the merchant vessel;² the right to require it to do what is necessary to restore things to the state they would have been in if the breach had not occurred;³ in so far as that cannot be done, the right to require it to pay a sum of money corresponding to the value which a re-establishment of that situation would bear;⁴ the right to require it to provide guarantees against repetition of the conduct which occasioned the breach;⁵ and, lastly, the right to subject it to countermeasures, if necessary, in order to coerce it to perform the secondary, remedial obligations correlative to the foregoing rights.⁶ In marked contrast, none of these rights would be enjoyed by any of the other parties to the Geneva Convention.

² See draft Article 6(1)(a) proposed to the International Law Commission by its former Special Rapporteur on State Responsibility, Willem Riphagen, in his Sixth Report on (1) the Content, Forms and Degrees of State Responsibility, and (2) the 'Implementation' (*mise en oeuvre*) of International Responsibility and the Settlement of Disputes (hereinafter referred to as Riphagen's Sixth Report): *Yearbook of the International Law Commission*, 1985, vol. 2, part 1, p. 3 at p. 8.

Riphagen characterizes this as a 'new', remedial right to require the performance of a similarly 'new', remedial obligation which is imposed on a wrongdoing State as a consequence of its breach of the 'old', or original, obligation under the treaty (para. 3 of his commentary, *ibid.*, p. 9). However, in so far as this 'new' obligation requires the wrongdoing State to put an end to its breach, it is merely a more particular and concrete statement of the 'old', original obligation itself; for the State in breach is thereby required to resume performing its obligations under the treaty, something which it is anyway obligated to do by those obligations themselves, those obligations not having been destroyed by the breach: Tomuschat, *ibid.* 1985, vol. 1, p. 125; Arangio-Ruiz, *ibid.*, p. 149. Cf. Graefrath, *Recueil des cours*, 185 (1984-II), p. 9 at p. 73.

³ As, for example, by returning objects seized during the boarding of the vessel. See Riphagen's proposed draft Article 6(1)(c): Riphagen's Sixth Report, p. 8.

⁴ As, for instance, by compensating financial losses arising from the delay caused to the merchant ship's voyage. See Riphagen's proposed draft Article 6(2): Riphagen's Sixth Report, pp. 8-9. This particular remedial right is often described as a right to require the wrongdoing State to make 'reparation' for its wrong. However, this description more properly applies to all of the rights described in the text accompanying nn. 2-5: Graefrath, *loc. cit.* above (n. 2), at pp. 46, 69, 70 and 72-3. The right described in the text accompanying the present note will here be described as a right to require 'pecuniary reparation' in order to avoid confusion.

⁵ Riphagen's proposed draft Art. 6(1)(d): Riphagen's Sixth Report, p. 8. The form of these guarantees is a subject of some uncertainty: e.g. the FRG, A/C.6/39/SR.36, p. 5. Moreover, some members of the International Law Commission have questioned whether such a right exists in contemporary international law: Balanda, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 113; Ushakov, *ibid.*, p. 119; Tomuschat, *ibid.*, p. 126. But see Graefrath, *loc. cit.* above (n. 2), at pp. 84-9.

⁶ Riphagen's proposed draft Articles 8 and 9: Riphagen's Sixth Report, pp. 10 and 11. The right to take countermeasures is a different type of right from the preceding remedial rights. The latter are rights to require the State in breach to perform certain correlative obligations which have been imposed on it as a consequence of its wrongdoing. In contrast, the right to take countermeasures is a freedom rather than a claim-right. The State entitled to take countermeasures was previously obligated to the State in breach to perform certain acts, and the latter State had a correlative right to require the former to perform them. Once the right to take countermeasures vests in the former, it becomes free to choose not to do those acts, receiving a dispensation from the performance of its obligations. The wrongdoing State concomitantly loses its right to require their performance.

The remedial rights and obligations which are listed in the text accompanying the previous four notes are usually termed 'secondary'. This term distinguishes them from the original, 'primary' right and obligation whose infringement and breach caused them to arise (though cf. n. 2 above). The right to take countermeasures is generally termed a 'secondary' right, too, along with these other remedial rights, since, like them, it only arises once a 'primary' right and obligation have been infringed and a wrong has been committed. Austria, however, preferred the term 'tertiary', pointing out that the right to take countermeasures only arises once the wrongdoing State has failed to fulfil its secondary obligations (though cf. again n. 2): A/C.6/40/SR.33, p. 13. The more usual terminology will be adopted here.

At the same time, there are some multilateral treaties which do create obligations which, when they fall to be performed, are owed to all of the parties. Consequently, when those agreements are breached, every party is endowed with at least certain remedial rights against the wrongdoer. However, this is generally thought to be exceptional, and the classical supposition—that obligations under multilateral treaties are owed to but one, or else a few, of the parties—is assumed to be the rule.

The question of which parties to a multilateral treaty have a right to its performance and are thus vested with remedial rights in the event of its breach has recently been the subject of detailed examination by the International Law Commission. In 1985, as part of its work on the 'content, forms and degrees' of State responsibility,⁷ the Commission provisionally adopted an article dealing with this issue, constituting Article 5 of Part Two of the Commission's Draft Articles on State Responsibility.⁸ This provision designates the State which is 'injured' by an international wrong, and which is consequently vested with remedial rights against the wrongdoer, by identifying the State which holds the right correlative to the obligation breached; and, as is clear from a study of the parts relating to breaches of multilateral treaties, it embodies the common suppositions which have just been described:

⁷ The Commission is conducting its study of State responsibility by dividing that subject into at least two parts. The first part deals with the question of when State responsibility arises. In 1980 the Commission completed its first reading of a series of 35 draft articles dealing with this topic. These can be found in the *Yearbook of the International Law Commission*, 1980, vol. 2, part 2, at pp. 30-4. In the same year, the Commission began work on the second part of its study, examining the content, forms and degrees of State responsibility. Willem Riphagen was appointed the Commission's Special Rapporteur on State Responsibility in 1979, and between 1980 and 1986 he delivered seven reports to the Commission. In 1986 Riphagen was not re-elected to the Commission, and his place as Special Rapporteur on State Responsibility was taken by Arangio-Ruiz in the following year.

⁸ Draft Articles 1 to 4, which are of a preliminary nature, were provisionally adopted by the Commission in 1983: *Yearbook of the International Law Commission*, 1983, vol. 2, part 2, pp. 42-3. Originally numbered draft Articles 1, 2, 3 and 5, they were renumbered by the Commission in 1985.

In 1984, in his fifth report to the Commission, Riphagen proposed for discussion a draft Article 5 dealing with the problem of identifying the State or States in which remedial rights vest when an international wrong is committed and State responsibility arises: *Yearbook of the International Law Commission*, 1984, vol. 2, part 1, p. 1 at p. 3 (hereinafter referred to as Riphagen's Fifth Report). He supplied a commentary to explain his proposal in the following year: Riphagen's Sixth Report, pp. 5-8. Riphagen's proposed draft Article 5 was placed before the Commission in 1984 at its 1858th meeting, along with eleven other suggested articles dealing with the content, forms and degrees of State responsibility. After a debate ranging over all these articles, Riphagen's proposed draft Articles 5 and 6 were referred to the Commission's Drafting Committee at the close of the 1867th meeting. However, it was understood that observations on these two articles might still be made in Plenary at the Commission's next session in 1985. Many comments were in fact made then. Taking these comments into account, the Drafting Committee reported to the Plenary at its 1929th meeting, and draft Article 5 was adopted by the Commission at its following meeting. Although based on Riphagen's suggested provision, the Commission's draft article does depart from it in several important respects.

Since 1985, no further draft articles have been adopted by the Commission. Riphagen's proposed draft Article 6 has remained before the Drafting Committee, joined in 1986 by the other ten articles which Riphagen put before the Commission in 1984.

Article 5

1. For the purposes of the present articles, 'injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.

2. In particular, 'injured State' means

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgment or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under Articles 14 and 15], all other States.⁹

The drafting history of paragraph (2) (e) (i) reveals that it envisages cases in which, when an obligation imposed by a multilateral treaty falls to be performed, it is owed by the party on which it is incumbent to either one, or else a few, of the other parties to that treaty.¹⁰ It thus does not

⁹ *Yearbook of the International Law Commission*, 1985, vol. 2, part 2, at p. 25. For the Commission's Commentary on draft Article 5, see *ibid.*, pp. 25-7.

¹⁰ See paras. 14-17 of Riphagen's commentary on his proposed draft Article 5: Riphagen's Sixth Report, p. 7.

govern those cases in which an obligation is owed to each and every one of the parties, as the International Law Commission's Commentary makes clear.¹¹ They are dealt with by the other parts of paragraph (2) (e), by paragraph (2) (f) and by paragraph (3).¹²

Although the multiplicity of these latter provisions might create the impression that the situation which they contemplate prevails under most multilateral treaties, the International Law Commission in fact considered that cases in which treaty obligations are owed *erga omnes partes* represent the exception rather than the rule and that the more normal situation is that which is described in paragraph (2) (e) (i).¹³ This is evident from the limited scope of the provisions of draft Article 5 which contemplate such obligations, it clearly being presupposed that paragraph (2) (e) (i) adequately describes the position under the remaining host of multilateral treaties to which these provisions do not apply. Thus, paragraph (2) (e) (ii) deals with an unusual type of obligation which usually arises under such treaties as fisheries conservation agreements and disarmament and demilitarization conventions; paragraph (2) (e) (iii) regulates the special category of human rights agreements; paragraph (3) deals with the novel and unusual problem of international crimes; and paragraph (2) (f), although not relating to a clearly demarcated category of agreements, deals with cases in which there is some express indication in the treaty itself that the obligations which it creates

¹¹ Para. 17 of the Commission's Commentary: loc. cit. above (n. 9), at p. 26. Cf. the more equivocal comment of Czechoslovakia in the UN General Assembly's Sixth Committee: A/C.6/39/SR.43, p. 6.

¹² The GDR thus remarked that subparagraphs (e) and (f) were based upon a distinction between, on the one hand, those multilateral treaties under which, when the obligations fall to be performed, the parties on which they are incumbent owe their performance to one other party only, so reducing those agreements into a network of 'bilateralizations', and, on the other hand, those treaties creating obligations which are 'genuinely multilateral in nature'. The former type of treaty is dealt with in subparagraph (e) (i), the latter in the other provisions: A/C.6/40/SR.25, p. 3.

Although paragraph (3) does not state that international crimes may be committed by breaching a treaty, the exemplary list of crimes provided in Article 19(3) of Part 1 of the Commission's Draft Articles on State Responsibility includes the breach of several obligations which are imposed by multilateral conventions. Moreover, the celebrated paragraphs from the International Court's judgment in the *Barcelona Traction* case in which the notion of obligations *erga omnes* is adumbrated, and which is often treated as constituting a partial list of international crimes, include the observation that several of the obligations listed are created by 'international instruments of a universal or quasi-universal character': *Barcelona Traction, Light and Power Co. Ltd.*, judgment, *ICJ Reports*, 1970, p. 3 at para. 34. Furthermore, Dupuy considers that it will be difficult, if not impossible, to develop a proper system of international criminal law without the certainty and precision which only treaties can provide: *Revue générale de droit international public*, 84 (1980), p. 449 at p. 468.

¹³ Riphagen in his Fourth Report on the Content, Forms and Degrees of International Responsibility (Part Two of the Draft Articles) (hereinafter referred to as Riphagen's Fourth Report): *Yearbook of the International Law Commission*, 1983, vol. 2, part 1, p. 3 at pp. 13, 21 and 22. See Riphagen, *ibid.* 1984, vol. 1, p. 276; Sinclair, *ibid.* 1985, vol. 1, p. 89; Njenga, *ibid.*, p. 123. See also USSR, A/C.6/39/SR.42, p. 2, and A/C.6/40/SR.25, p. 13; Ukraine, A/C.6/39/SR.44, p. 6; and Graefrath, loc. cit. above (n. 2), at pp. 22, 24, 51 and 52.

are owed *erga omnes partes*,¹⁴ thus making its range of application strictly limited.¹⁵

For present purposes, it will be assumed that one of the common suppositions which has been described is well-founded: namely, that, in the case of the majority of multilateral treaties, when the obligations which they impose are breached, only one of the parties, or else a small number of them, is vested with the full gamut of remedial rights recognized by international law. No attempt will be made to challenge this assumption and examine its basis in legal practice and policy, nor will any attempt be made to delimit the categories of treaties to which it properly applies. The purpose is rather to query the concomitant assumption that none of the other parties is vested with any remedial rights at all. To this end, the factors which favour conferring remedial rights on those other parties will be examined, and the precise form and content of the rights which they justify will be analysed. A survey will then be made of the relevant legal materials in order to ascertain the extent to which rights of that kind have been recognized to exist.

II. SOLIDARITY

Pressure has long been felt to broaden the number of States which are entitled to react to breaches of multilateral treaties. In particular, it has often been argued that all of the parties to such a treaty should be recognized as enjoying the right, in the name of 'solidarity', to take at least some

¹⁴ Trinidad and Tobago, A/C.6/40/SR.32, p. 4. This limitation on the scope of paragraph (2)(f) was insisted on by Flitan and Ogiso: *Yearbook of the International Law Commission*, 1985, vol. 1, pp. 102 and 122 respectively. Several other members of the Commission urged that the application of this provision should be restricted so as not to expand unduly the number of treaties which might be said to create obligations *erga omnes*: Díaz González, *ibid.*, p. 133; Razafindralambo, *ibid.*, p. 135; and Arangio-Ruiz, *ibid.*, p. 149.

It is not quite clear what 'expressly stipulated' means in subparagraph (f), nor whether these words do not make the whole provision redundant, given the existence of draft Article 2: Austria, A/C.6/40/SR.33, p. 15; cf. Sinclair, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 89. The example given by the Commission—the stipulation in the UN Convention on the Law of the Sea that the deep sea-bed is the 'common heritage of mankind'—shows that it is not intended that the treaty state *expressis verbis* that the obligations which it lays down are owed to all parties. Rather, it seems that there must be some type of indication in the express wording of the treaty that an interest is involved which is indivisible in nature, such that its impairment necessarily affects all of the parties to the treaty.

Other treaties which have been mentioned as possibly falling within subparagraph (f) include: treaties relating to public health and the environment (Reuter, *Yearbook of the International Law Commission*, 1984, vol. 1, p. 279); treaties which establish regional customs unions or promote the economic integration of a group of States (Sinclair, *ibid.* 1985, vol. 1, p. 89; Balanda, *ibid.*, p. 113; Riphagen, *ibid.*, p. 157); commodity agreements (Sucharitkul, *ibid.*, p. 90); and conventions which attempt to suppress the hijacking of aircraft (Sucharitkul, *loc. cit.*; Riphagen, *ibid.*, p. 157). In connection with the last category of treaties, note especially the so-called Bonn Declaration, which was jointly issued in 1978 by Canada, the FRG, France, Italy, Japan, the UK and the USA: Busuttill, *International and Comparative Law Quarterly*, 31 (1982), p. 474 at p. 475.

¹⁵ Para. 24 of the International Law Commission's Commentary: *loc. cit.* above (n. 9), at p. 27.

action against a State which breaches its obligations thereunder.¹⁶ This notion of 'solidarity' is generally conceived as being unitary and monolithic; but, on closer examination, it can be seen to incorporate and respond to two distinct sets of considerations, each of which militates in favour of a discrete set of remedial rights to give it appropriate legal expression. To distinguish these two notions, one will be termed 'solidarity *stricto sensu*' and the other 'solidarity *lato sensu*'.

(a) *Solidarity Stricto Sensu*

It is a commonplace observation that the international legal system has no centralized apparatus for enforcing the rights which it recognizes. States are thus left to enforce their rights through their own efforts. At the same time, by not prohibiting certain types of activity which States might undertake and which are potentially damaging to the interests of other States, the law provides certain means which a State can use to help it enforce its rights, both primary and secondary; for, without doing anything unlawful, a State can engage in activity which is harmful to another State in order to coerce it to perform its correlative obligations. Such measures are usually known as retorsion.¹⁷ However, the ability to practise retorsion might not provide a State with sufficient means to enforce its rights. For this reason, the law also allows a State whose rights have been infringed to suspend performance of certain of the obligations which it owes to the wrongdoing State in order to coerce the latter to respect its rights—that is, the victim of an international wrong enjoys the right to take countermeasures against its perpetrator. Nevertheless, even with the right to do this, an injured State may not be able to bring to bear on a wrongdoer pressure of a type or degree sufficient to persuade it to comply with its obligations. The conditions which need to be fulfilled if countermeasures—or measures of retorsion, for that matter—are going to have any realistic prospects of success are both multiple and extremely complex, and it is quite likely that they will not all be met in a given case.¹⁸

The State whose rights have been infringed will not always be able to adopt a course of action damaging to the wrongdoer: there may be no advantage which it lies within its power to deny to that State, for example. Even if it is able to deny it some resource or benefit, the injured State still might not be able to place the wrongdoer in such an unfavourable position that that State is left with no choice but to respect its rights. One reason for this might be that the damage which the injured State can inflict on the wrongdoer might be outweighed by the benefits which the latter derives from the breach of its obligations. Moreover, it is quite rare that one State is so dependent upon another that, if the latter denies it some resource or

¹⁶ See, for example, the doctrine cited by Akehurst: this *Year Book*, 44 (1970), p. 1 at pp. 1–2.

¹⁷ Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984), at pp. 5–13.

¹⁸ Leben, *Annuaire français de droit international*, 28 (1982), p. 9 at p. 70.

benefit, it cannot obtain that resource or an equivalent benefit from elsewhere. Indeed, it might be self-sufficient in that resource or be able to do without that benefit. Furthermore, even if the State in breach is dependent upon the State whose rights it has infringed, this will be of little avail to the latter if it, in its turn, enjoys a similar dependence upon the former. In circumstances such as these, if the injured State takes countermeasures against the State in breach, it might find itself subjected to even greater disadvantages than those which it can inflict on that State; for the wrongdoer may claim that, since it has committed no wrong itself, the action taken by the State which alleges itself injured are not lawful countermeasures at all, but illegal acts, to which it may lawfully react by taking countermeasures of its own.¹⁹

Whether a State will have the means at its disposal to enforce its rights will, therefore, depend on a whole host of factors which affect and define both its relationship with the State in breach and the relationship of each of those two States with other, third States. Moreover, while those factors might pertain in favour of State X in its relations with State Y, enabling it to enforce its rights against the latter, they might not pertain in its favour in its relations with another State, State Z. A State may thus find that, while international law purports to provide it with the means to enforce its rights via the right to take countermeasures, many of its rights will, nevertheless, remain unenforceable. Leben consequently remarks 'le caractère aléatoire de la réussite des contre-mesures dans la société internationale',²⁰ and the same could just as well be said of measures of retorsion. Furthermore, and for the same reasons, if the only means which a State were to have at its disposal for the enforcement of its rights was the freedom to take those countermeasures which it could initiate by its own efforts, then that would create and legitimate a situation in which the ability of a State to enforce its rights was essentially dependent upon the position which it enjoys in the current power-structure of international economic and political relations—something quite inconsistent with the principle of the sovereign equality of States.²¹

If, therefore, the rights recognized by international law are to be adequately protected, the ability of the victims of international wrongs to enforce their rights must be further enhanced. Short of creating a centralized enforcement institution, the only way of doing this is not to leave an injured

¹⁹ On the danger that countermeasures may excite 'counter-countermeasures' and so lead to an escalating spiral of reprisals, see Riphagen's Sixth Report, p. 31; and Morocco, A/C.6/40/SR. 36, p. 6. The injured State may also be caused damage by the very countermeasures which it itself initiates; for that State and its nationals may depend upon the continuation and the success of that very relationship which makes possible the countermeasures which are taken against the wrongdoing State—in short, many international relationships are marked by interdependence rather than one-sided dependence: Leben, loc. cit. (previous note), at pp. 72–3.

²⁰ Loc. cit. above (n. 18).

²¹ Simma, in Weiler, Cassese and Spinedi (eds.), *International Crimes of State. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1988), p. 283 at p. 284.

State to depend on the means which it itself may command, but rather to enable other States, prompted by considerations of friendship and good neighbourliness, to come to its aid in a spirit of solidarity.²² The conditions which need to be fulfilled if countermeasures against a wrongdoing State are to have any prospect of success might not pertain in favour of the injured State itself, but they might well do so in respect of another State. If the former State were able to obtain the assistance of the latter in taking action against the State in breach, then it would enjoy a reasonable chance of enforcing its rights. Moreover, even if the conditions which make for the success of countermeasures were not met in respect of any of the States which joined the injured State in taking action against the wrongdoer, they might nevertheless be fulfilled in respect of those States acting together: their action in concert might enjoy a chance of success which would not attend action taken by any of them on its own.

Clearly, to permit States to come to the assistance of the victim of an international wrong will not guarantee that the latter State's rights are respected. In so far as other States are free to choose not to come to its aid,²³ an injured State cannot depend upon receiving any assistance at all.²⁴ Furthermore, just as there can be no assurance that the conditions which make for the efficacy of countermeasures will pertain in favour of the injured State itself, likewise, there can be no certainty that they will pertain in respect of any of the States which might choose to come to its aid. Nevertheless, to permit other States to assist a State which is injured in its rights would cure at least some of the defects of the system of decentralized law-enforcement which currently prevails in international society, and half a loaf is certainly better than no bread at all.

If all of the States party to a multilateral treaty are to be able to assist one of their number in enforcing its rights thereunder,²⁵ then it must be accepted that rights can exist under such a treaty on two separate levels. Using once more the example of the Geneva Convention on the High Seas,

²² Zoller, *op. cit.* above (n. 17), at pp. 69 and 115; McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 97; and Waldock, *ibid.* 1966, vol. 2, p. 36. Cf. Leben, *loc. cit.* above (n. 18).

²³ In the absence of an express provision to that effect, one party to a multilateral treaty does not guarantee that another party will observe its obligations: Kiss, *Répertoire de la pratique française*, vol. 1 (1962), p. 125. It is most unlikely, therefore, that one State can be said to undertake to another that, if the latter's rights are infringed, it will take action, potentially harmful to its interests, in order to help the latter enforce its rights. Cf. nn. 247 and 249 below.

²⁴ Zoller, *op. cit.* above (n. 17), at p. 70.

²⁵ It is doubtful whether there is much good reason to permit States which are not parties to the treaty to provide such assistance. The general policy of making treaties into systems which are closed to non-parties militates against this: cf. Articles 34-7 of the Convention on the Law of Treaties, 1969. Moreover, those States which are parties to the treaty will generally have some reason to support the injured party, in so far as they all have an interest in upholding that treaty and the rules which it creates, both of which are threatened with erosion by the attack on the injured State's rights. This interest also serves to provide a further justification for the right of States which are parties to the treaty to take action against the wrongdoer: see section II.(b) below. Since this interest does not apply to motivate or to justify action taken by States which are not parties to the treaty, there is neither as much point nor so much justification in allowing them to take action of the type under discussion.

a naval State, State A, has an obligation under Article 22(1) of that convention that its warships not board merchant vessels which fly the flag of State B. The first level of rights and obligations under the Convention is composed of the obligation which State A owes to State B not to board its merchant vessels, to which obligation State B holds a correlative right. If State A breaches this obligation, State B becomes entitled to the full range of remedial rights against State A which are provided by international law. However, beyond this first level of rights and obligations, there exists a second level, auxiliary to and dependent upon the first. The other States party to the Geneva Convention, State C *et al.*, are endowed with the right to require State A to perform its duty under Article 22(1) to State B, State A owing them a correlative obligation to observe it. Likewise, if State A breaches its primary obligation under that article to State B, State C has a right to require State A to perform its secondary, remedial obligations to State B,²⁶ and State A is correlatively obligated to State C to perform them. State C may, therefore, exact from State A the due performance of its obligations, both primary and secondary, to State B. Should State A fail to put an end to the breach of its primary obligation to State B, State C may lawfully take countermeasures against it to compel it to do so. Similarly, State C may employ countermeasures against State A to force it to perform its secondary, remedial obligations to State B.

This brief description of the way in which the law might accommodate action by way of solidarity leaves several major questions unanswered. The first relates to the precise content of the second level of rights which has been postulated. If the purpose of vesting such 'auxiliary' rights in all of the States party to a multilateral treaty is to enable them to help the State whose first-level rights have been infringed to enforce its rights against the State in breach, then exactly what remedial rights should States in the position of State C in the example above be accorded? Clearly, in view of their potentially vital role in accomplishing this purpose, State C should have both the right to bring a diplomatic claim against the wrongdoer demanding that it fulfil its primary and secondary obligations to the injured State and the right to take countermeasures against it, if necessary, in order to force it do so.²⁷ On the other hand, it is doubtful whether, from the point of

²⁶ This right is secondary in nature. This is because State C's primary right against State A—namely, its right to require State A to perform its primary obligations to State B—has been infringed. State A performs its duty of reparation to State C by doing that which is necessary to restore those interests of State C which are protected by its primary right to the position in which they would have been if the breach had not occurred. Since State C's interest is that State B is treated in accordance with its rights under the treaty, State A does this by resuming performance of its primary obligations towards State B; and, in so far as doing this does not place State B in the position in which it would have been had those obligations not been violated, as where State B has suffered losses on account of the breach, State A fulfils its obligation towards State C to restore its protected interest by doing what is required to make it as if there had been no breach, as by indemnifying State B for its losses.

²⁷ It is a precondition to the legality of countermeasures that the effects which they cause to the wrongdoing State are not manifestly disproportionate to the seriousness of the wrong to which they are a response: see Riphagen's proposed draft Article 9(2), Riphagen's Sixth Report, p. 11. This requirement might be thought to pose an insurmountable obstacle to the taking of countermeasures by States

view of the injured State, much useful purpose would be served by vesting a right in State C to receive guarantees from State A—the State in breach—against a repetition of the conduct which caused the breach of its primary obligations to State B.

A more difficult problem is whether State C should be accorded a right to receive pecuniary reparation from State A. Those who have examined this problem have tended to assume that it should not.²⁸ Riphagen justified this conclusion on the ground that State A's breach of its first-level obligation to State B will not cause State C or its nationals to suffer any material loss.²⁹ Yet it might well happen that the unlawful conduct of State A does cause some such loss to State C or its nationals. Nevertheless, it is probably correct that State C should not be entitled to claim pecuniary reparation in respect of these losses; for the rights which are vested in State C are accorded it solely for the purpose of enabling it to require of State A that it observe its obligations to State B, and not to protect itself against prejudice to its own or its nationals' interests. Therefore, any material loss which State C might have suffered as a consequence of State A's breach is irrelevant and State C cannot recover in respect of it.³⁰

It is, of course, possible that State C's rights against State A could be so defined that it is vested with the right to require from State A a sum by way of reparation calculated on the basis of the damage suffered by State B or its nationals.³¹ State C might then be accountable to State B for any money paid to it by State A in satisfaction of such a claim. At first glance, there seems little reason why this step should be taken. If State C were entitled to exercise such a right at the same time that State B was presenting its own

which are in the position of State C in the example given in the text, in so far as most of those States will have suffered no material harm on account of the infringement of the injured State's rights. Although State C might enjoy a right to take countermeasures against the wrongdoer, that right will, therefore, remain a technicality, since any harm which it inflicts on that State will be out of all proportion to the harm done to it by that State's wrongdoing. However, the purpose of the 'no-manifest-disproportionality' test is not that the damage done to the wrongdoer by the countermeasure must be roughly equivalent to the damage which that State's wrong caused the State taking the countermeasure to suffer, but rather that the harm inflicted by that measure should not exceed that which is reasonably required to compel the wrongdoer to return to legality: Zoller, *op. cit.* above (n. 17), at pp. 131–7. Riphagen's proposed draft Article 9(2) thus links the concept of proportionality to the seriousness of the wrongful act to which it is a response, and not to the material consequences of that act. The requirement in question, therefore, does not place any technical obstacle in the way of recognizing a second-level right to take countermeasures.

²⁸ Zoller, *op. cit.* above (n. 17), at p. 115.

²⁹ Riphagen's Sixth Report, p. 14 n. 44.

³⁰ If breaches of State A's obligation to State B are likely to cause significant prejudice to the interests of State C and its nationals, then that might be a reason for according a first-level right to State C against State A, similar to the first-level right already possessed by State B; but that is another question entirely.

³¹ Although it is somewhat unusual for one State to enjoy the right to claim pecuniary reparation for losses sustained by another State or its nationals, international law does know of such cases: Brownlie, *Principles of Public International Law* (3rd. edn., 1979), p. 481, *Aerial Incident of 27 July 1955, ICJ Pleadings*, p. 106; and note *Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports*, 1949, p. 174.

claim for pecuniary reparation, then that might hinder, rather than assist, State B by complicating its negotiations with State A. On the other hand, if State C's right were only to become operative if and when State A failed to satisfy State B's demands, then it would be doubtful whether vesting such a right would serve any useful purpose at all; for, if State A were unwilling to pay State B, it would hardly be likely to pay up to State C. However, there is at least one possible set of circumstances in which according a right of this type to State C might be of some assistance to State B. State C and State A might be mutually bound by an arrangement for the compulsory third-party settlement of their disputes, whereas State A and State B are not. State C might then be able to secure pecuniary reparation on State B's behalf, even when State B's own efforts had proved fruitless, being able to avail itself of means for the enforcement of its rights unavailable to State B itself.

Another difficult question is whether State C should be accorded a right to get a judgment against State A from an international tribunal. Such a judgment might take the form of a declaration that State A is in breach of its primary obligations to State B, or it might declare the content of the secondary, remedial obligations which State A owes to State B. It might even include an injunction to State A to perform its obligations, both primary and secondary, to State B.³² This may seem a strange question to ask. If a legal person enjoys a right, surely it can enforce it before a tribunal of that legal system. However, this need not be the case. In theory, at least, a legal system might create rights which are not enforceable by any of that system's tribunals.³³ Nevertheless, there is good reason to make State C's rights enforceable by this means. If State C were able to obtain a judgment of the type suggested, then that could greatly assist State B in the enforcement of its rights against State A, especially if State C and State A were mutually bound by an arrangement for the compulsory third-party settlement of their legal disputes whereas State B and State A were not. The reasons for this go beyond the authority possessed by the judgment of an international tribunal and the moral and political pressure which it might bring to bear upon a wrongdoing State. A State which needs to recruit other States to join it in taking action to enforce its rights is likely to find such assistance unforthcoming if the breach of its rights is not clearly and incontestably established.³⁴ The ability to get a judgment on those rights from an impartial third-party is, therefore, of the utmost importance in making solidarity

³² At first sight, it might appear that no tribunal could deliver such a judgment, since State C would be seeking an adjudication on rights which did not belong to it, but to State B. However, since State C has the right to require of State A that it perform its obligations to State B, a tribunal would ascertain whether that right had been infringed by examining whether State A was in breach of its obligations to State B, and it would enforce that right by ordering State A to perform those same obligations. Consequently, there is no technical problem in according State C a right of the type discussed. The question is rather whether State C should enjoy such a right.

³³ Zoller, *op. cit.* above (n. 17), at pp. 116-17.

³⁴ Leben, *loc. cit.* above (n. 18).

work; and, while it would be preferable if the State which alleges that its rights have been infringed could secure such a judgment, there is every reason to permit other States to do so, if that is the only way to get one.

It is not only the precise content of second-level rights which is problematic. Difficult questions also arise concerning the relationship which they should enjoy with rights of the first level. The purpose of vesting in State C the second level of rights which has been postulated is essentially an auxiliary one: to enable State C to help State B enforce its rights against State A. It follows that State C should be able to invoke its 'auxiliary' rights, by demanding of State A that it perform its primary obligations to State B and by taking countermeasures against it to coerce it to do so, only when State B itself decides to invoke its rights and require State A to perform its primary obligations. Thus, if State C were to believe that State A had breached its primary obligations to State B, yet State B thought that State A had acted lawfully, State C should not be entitled to take any action at all against State A; likewise, if State B acknowledged that State A had broken its primary obligations, but decided to waive the breach. By the same token, State C should only be entitled to require State A to do those things in fulfilment of its remedial obligations to State B which State B itself has required State A to do. Thus, if State B were to demand of State A a sum by way of pecuniary reparation less than that to which State C considered it to be entitled, then State C should not be able to require State A to pay a greater sum to State B, even if State B were indeed entitled to that amount. Likewise, State C's right to take countermeasures against State A to coerce it to perform its secondary obligations to State B should cease when State A has done those things by way of reparation which State B has demanded of it. If State B were to settle with State A for a sum less than that to which State C considered it to be entitled, State C should not be able to continue to subject State A to countermeasures in order to force it to pay the balance.³⁵

Furthermore, in view of their auxiliary nature, State C should not be able to exercise its second-level rights against State A until State B has asked it to do so.³⁶ If State C were able to take action against State A without a prior request from State B, then that might hinder, rather than assist, the latter in the enforcement of its rights. State B, being in the best position to judge what, if any, assistance it needs, should be accorded this degree of control over the lawfulness of State C's action. Moreover, if State C's 'auxiliary' rights were to be exercisable regardless of whether or not State B had first requested its assistance, the way would be open for parties to multilateral treaties to use a breach by one of their number as an excuse to inflict damage on the wrongdoer without reasonable cause; for they would then be

³⁵ Zoller, *op. cit.* above (n. 17), at pp. 69 and 115; McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 97.

³⁶ Cf. Zoller, *op. cit.* above (n. 17), at p. 69; and Simma, *loc. cit.* above (n. 21), at p. 313.

able to take action against that State even though it was not needed to help State B enforce its rights.³⁷

(b) *Solidarity Lato Sensu*

The need to enhance the enforceability of rights is one reason for recognizing that every party to a multilateral treaty can lawfully take at least certain action when that treaty is breached. However, a second, distinct set of pressures also militates in favour of this. Although a breach of a multilateral treaty will, in most cases, infringe the rights of only one, or else a small number, of the parties, at the same time, that breach touches every party to the treaty, even if it does not infringe its rights—even, indeed, if it does not cause it or its nationals to suffer any loss; for, as Reuter observes, ‘any violation of a treaty threaten[s] the survival of that treaty’,³⁸ and the survival of the treaty is something in which each party is surely interested.

Every breach of treaty is a challenge to the rule infringed. Its commission invites emulation as long as it does not attract a response which is either sufficient to repress it or else is sufficiently damaging to the wrongdoing State to deprive it of any benefits which it might have gained from the breach, thus making it clear to others who might be minded to break the rule that

³⁷ The necessity of a prior request for assistance from the State whose first-level rights have been infringed before second-level rights can be exercised might also be supported by appealing to an analogy between action by way of solidarity *stricto sensu* and action by way of collective self-defence. In both cases, a State is enabled to take action which is normally unlawful in order that it might assist another State in putting an end to an infringement of its rights. Since the two forms of action are, therefore, analogous, the same conditions should presumably govern the legality of each. A State which is not the victim of an armed attack is only entitled to use force against a State which is conducting such an attack if the State which is the victim of that attack first asks it to do so: *Military and Paramilitary Activities in and against Nicaragua (Merits)*, ICJ Reports, 1986, p. 14, at paras. 196–9, though cf. paras. 232 and 236. By analogy, fulfilment of a similar condition should be a prerequisite to the legality of non-forcible countermeasures taken by a State whose first-level rights have not been infringed by the State against which such action is taken. Indeed, the International Court in the *Nicaragua* case appears to have supported this line of reasoning when it discussed the issue of whether the USA might have lawfully supported the ‘contra’ rebels as a countermeasure in response to Nicaragua’s alleged breach of its duty to El Salvador not to intervene in its internal affairs or to use force against it; for the Court remarked that ‘a right to act in this way . . . would be analogous to the right of collective self-defence’ (para. 210).

However, in its Commentary to Article 34 of Part 1 of its Draft Articles on State Responsibility, the International Law Commission has strongly resisted any analogy between the law relating to self-defence and the law relating to countermeasures: *Yearbook of the International Law Commission*, 1980, vol. 2, part 2, pp. 53–4. See also Leben, loc. cit. above (n. 18), at p. 67 n. 199; and Dupuy, *Revue générale de droit international public*, 87 (1983), p. 505 at p. 525 and n. 41. Cf. also Zoller, op. cit. above (n. 17), at pp. 40–1; and Akehurst, loc. cit. above (n. 16), at pp. 4–6. Since the two institutions operate within very different political contexts and respond to very different practical needs, this caution is well-founded. It should also be noted that the International Court in the *Nicaragua* case did not need to consider whether the USA might take ‘collective’ countermeasures without a prior request to that effect from El Salvador, since it was able to determine the legality of the USA’s action on other grounds: para. 249.

³⁸ *Yearbook of the International Law Commission*, 1984, vol. 1, p. 275. See also Reuter, *Introduction au droit des traités* (2nd edn., 1985), para. 282; Riphagen, *Yearbook of the International Law Commission*, 1984, vol. 1, p. 275; Riphagen’s Fourth Report, p. 21; and the sources quoted at nn. 115–17 and 124–5 below.

the benefits of so doing will probably be outweighed by the disadvantages. Moreover, even a breach which incurs such a response may weaken the rule which is infringed as long as that breach is allowed to subsist. The example created by the continued disregard of a legal standard draws attention to the possibility of departing from that rule, questioning assumptions that the obligation should be followed and inviting a prudential approach to the question of compliance. Therefore, if obligations under a multilateral treaty are not enforced and their breach suppressed, it is likely that they will come to be increasingly disregarded, and, even if the instant breach does not cause loss to a particular party or infringe its rights, future breaches might. It is thus very much in the interests of each party to the treaty that all breaches, even those which do not infringe its rights, are repressed.

One way of safeguarding this shared interest of the parties to a multilateral treaty is to entrust its protection in each case of breach to one of their number: namely, the State whose rights have been infringed. However, although this might serve as the primary means of upholding and defending the obligation breached, its effectiveness is likely to be limited. The State injured by the breach may fail to take any action against the wrongdoing State, erroneously believing its conduct not to be in violation of the treaty. If the injured State does recognize that its rights are infringed, it may still decide to take no action against the wrongdoer, or else choose to employ measures which are insufficient to force the wrongdoing State to put an end to the breach of its obligations. Indeed, the injured State may be incapable of taking any measures which would be adequate to this task. Consequently, if treaties are to be upheld and the obligations which they create maintained, it may well be necessary to vest all of the parties with the right to take at least some form of action in their defence.

If this were to be done, then it would again require recognition that rights may exist under a multilateral treaty on two separate levels. This can be illustrated by using once more the example of Article 22(1) of the Geneva Convention on the High Seas. The first level of rights would be exactly the same in nature as that which has been described in the course of the discussion of 'auxiliary' rights above. Thus, a naval State, State A, is under an obligation that its warships not board merchant vessels which fly the flag of State B, this obligation being owed to State B and State B having a correlative right against State A to its performance. If State A breaches this obligation, State B is immediately vested with the full range of remedial rights against State A which is recognized by international law. However, behind and beyond this first level of rights and obligations, there exists a second. In view of their interest in upholding the rules which the Convention creates, the other States party, State C *et al.*, have a right against State A that State A perform its primary obligation under Article 22 to State B, State A being under a correlative obligation to State C to do so. Should State A breach this obligation to State C by breaching its primary

obligation to State B, State C will have the right to demand of State A that it put an end to this breach by ceasing to perform those acts which put it in violation of its obligation to State B.³⁹ If State A fails to do this, then State C will be entitled to take countermeasures against State A in order to coerce it to do so.⁴⁰

A case can be made for recognition of this second level of rights by means of a further argument, closely related to the preceding one, but distinct from it. As has already been seen, if breaches of a rule of international law go unchecked, this may, in time, reduce the capacity of that rule to guide and determine conduct. However, things may go further than this. If a practice develops which is in breach of a treaty obligation and which meets with the toleration of most of the parties to that treaty, then what that obligation requires might even be altered and amended to conform to the view of its content which is revealed by that practice. The possibility of such a treaty-amending practice is recognized by Article 31(3) (b) of the Convention on the Law of Treaties 1969. Indeed, international tribunals have several times held that treaties have changed their meaning through a process of this kind—notably, in the *US/France Air Services* arbitration of 1963 and the *Namibia* case of 1971.⁴¹

Every State party to a multilateral treaty clearly has an interest in being able to ensure that the rights and duties under that treaty maintain their original content and are not amended through the growth of a practice of the sort described.⁴² At the same time, this interest is inadequately protected if the only means at its disposal for preventing the growth of a treaty-amending practice is the ability to take action in respect of breaches which infringe its rights. By the time that such a breach occurs, it might well be too late to do anything, the practice already being firmly established. Even if a State were unable to prevent such a practice developing and amending

³⁹ McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 97. McCaffrey is less willing to take the next step mentioned in the text. Jessup maintains that community interest at least justifies recognizing that each party to a multilateral treaty has the right to protest at its breach: *A Modern Law of Nations* (1948), at pp. 152 and 154. However, a right to require the performance of an obligation and a right to protest at its breach are somewhat different things; and, whereas to recognize the former as vested in each party to a treaty would require the recognition of a second level of rights of the type described in the text, to accept the latter probably would not: see text below at nn. 45–7.

⁴⁰ Although it might be thought otherwise, the fact that State C may have suffered no damage as a result of State A's wrongdoing will not, practically speaking, nullify its right to take countermeasures against that State: see n. 27 above.

⁴¹ Case concerning the *Interpretation of the Air Transport Services Agreement between the United States of America and France*, signed at Paris on 27 March 1946, *Reports of International Arbitral Awards*, vol. 16, p. 5 at pp. 62–3 (and see pp. 70 and 73–4); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports*, 1971, p. 16 at paras. 21–2. See also *Temple of Preah Vihear (Merits)*, *ICJ Reports*, 1962, p. 1 at pp. 33–4; and Cot, *Revue générale de droit international public*, 70 (1966), p. 632 at pp. 653–66, especially at pp. 664–6.

⁴² Naturally, a State may decide that its interests will be better served if the treaty is amended by a particular practice and so wish to let it develop. Conversely, it might judge that the original meaning of the treaty best serves its interests. A State thus needs to be able to uphold and defend the original meaning of the treaty if it should wish to do so.

the treaty,⁴³ it might still try to prevent this alteration becoming opposable to it by refusing to acquiesce in and protesting against breaches which affect its rights. However, it might be politically difficult for one State to stand out against a practice which prevails among most of the parties to a treaty. Moreover, it is uncertain, to say the least, whether one party can prevent from binding it a practice which has become so well established as to amend that treaty.⁴⁴ Therefore, if States are to be able to protect themselves from unwanted changes in the meaning of treaties, they must be able to take action to prevent the development of treaty-amending practices long before they have become firmly established. To do this, they must be able to take action whenever breaches occur, even when those breaches do not infringe their own rights.

One form of action which a State might take to prevent a treaty being amended through practice is to protest against breaches whenever they occur, so preventing them from winning the general toleration which they need if they are to effect an alteration in the meaning of that treaty. Some writers contend that a diplomatic protest made by a State which is not entitled to claim performance of the obligation breached constitutes an unlawful intervention in the affairs of the State which is the target of that protest.⁴⁵ If so, to protest at the breach of an obligation without committing a wrong itself, a State needs to be able to point to a right to claim the performance of that obligation. To enable the parties to a treaty to protect themselves against practices which threaten to amend it would, therefore, require them to be vested with a whole special set of rights. However, it is doubtful whether the premiss of this argument is correct; for States appear to enjoy a general freedom to protest at illegal acts without thereby committing any wrong. As Judge Fitzmaurice observed in the *Barcelona Traction*

⁴³ The view prevailed at the Vienna Conference on the Law of Treaties that a treaty might be amended by a practice of the type described even if that practice was not adopted by all of the parties to the treaty and even if a small number of them opposed it: Tunkin, *Theory of International Law* (Butler trans., 1974), at p. 164. (It might well be asked why a practice of only a few of the parties to a multilateral treaty might not lead to an amendment of that treaty as between that group: cf. Article 41 of the Vienna Convention on the Law of Treaties, 1969.)

⁴⁴ This question involves several extremely complex issues, which cannot be discussed here. They include the question whether a treaty-amending practice should be regarded as a type of customary law which is built upon a treaty, or whether it is a law-creating process which is *sui generis*, being governed by its own particular rules. If the former, a question next arises which is analogous to that posed by the long-running debate as to whether general customary law binds all States or whether a State can prevent such a rule being opposable to it.

⁴⁵ Graefrath, loc. cit. above (n. 2), at pp. 52–3; Simma, loc. cit. above (n. 21), at p. 284. Riphagen avoids committing himself on this issue: Riphagen's Fourth Report, pp. 13–14. However, he recognizes that the claim that one has a right to require the performance of an obligation and is thus entitled to exact its due performance is something different from the claim that, while one does not have the right to require the performance of an obligation, one is nevertheless free to protest at its breach. This is indeed so. The latter right is not a claim-right, but a freedom. Moreover, the latter right cannot be relied on to get a judgment from a tribunal enjoining performance of the obligation in question. Riphagen recognized that to make the former claim without legal warrant does constitute intervention in the affairs of the State to which the claim is directed, whatever the correct position might be as regards the latter claim: Riphagen's Fourth Report, p. 21. On this distinction, see the text following this note.

case, 'diplomatic representations . . . need not necessarily be based on or imply a claim of right, but are often admitted or received in the absence of any such claim or pretension to it'.⁴⁶ Thus, in the diplomatic activity preceding the litigation in that case, several States which had no right against Spain relating to its treatment of the Barcelona Traction Company made representations to the Spanish government concerning it and were even admitted into structured negotiations on the subject.⁴⁷

If protesting were sufficient to enable parties which wish to uphold the original meaning of a treaty to achieve their aim, then it might not be necessary to recognize a whole network of special legal rights under a multi-lateral treaty: reliance could simply be placed on the general freedom which States enjoy to communicate their views to each other. However, States may well need to do more than protest if they are to prevent the amendment of a treaty. Diplomatic approaches might be insufficient to dissuade a wrongdoing State from repeating its breach or to discourage other States from either tolerating or emulating its behaviour. Moreover, the tribunal in the *US/France Air Services* arbitration of 1963 suggested that mere protests might not be enough to prevent a treaty from being amended by a practice of the type under discussion if that practice were to continue in spite of those protests and were made to prevail as a matter of fact.⁴⁸ States opposed to such an amendment may, therefore, need to avail themselves of means more drastic than simple protests. In particular, they may need to be able to take countermeasures against States which disregard their treaty obligations in order to force them to put an end to their wrongful conduct, so making the treaty effective in practice. Permitting each party to a multi-lateral treaty to take action such as this certainly would require vesting it with second-level rights, whether allowing it to protest would do so or not.

Having detailed the arguments which favour recognizing a second, distinct set of second-level rights under multilateral treaties, the same questions need to be asked about them as were asked about 'auxiliary' rights—the first set of second-level rights, discussed above: namely, what precise content do these second-level rights have, and what is the exact nature of their relationship with the first level of rights under the treaty?

This set of second-level rights should clearly include a right to require a State to perform its primary obligations under a treaty, to bring a diplomatic claim against it if it should fail to do so, and to subject it to counter-

⁴⁶ Para. 31: *ICJ Reports*, 1970, p. 3 at p. 82. See also para. 87 of the Court's judgment in that case.

⁴⁷ Paras. 19–23 and 72. The US acted out of the most abstract concern for the maintenance of the law in the field in question, it seems: para. 22.

It is true that the International Court in the *South West Africa* cases of 1966 twice described the right to claim the performance of an obligation as a 'right of direct intervention': *South West Africa, Second Phase*, judgment, *ICJ Reports*, 1966, p. 6 at paras. 25 and 26. However, the right to require the performance of an obligation and the right to protest at its breach are distinct: see n. 45 above.

⁴⁸ Pp. 63–4, including p. 64 n. 1. Cf. Cheng's view of customary international law, in Macdonald and Johnston (eds.), *The Structure and Process of International Law* (1983), p. 513 at pp. 544–8.

measures, if necessary, in order to coerce it to put an end to their breach. On the other hand, it is doubtful whether much useful purpose would be served were they to include a right to require the wrongdoing State to perform its secondary, remedial obligations to the State whose first-level rights have been infringed; nor would there seem to be much point in recognizing a right to take countermeasures against the wrongdoing State in order to compel it to perform those obligations. If they are to be recognized at all, this set of second-level rights is vested in the parties to a multilateral treaty in recognition of their interest in preserving and upholding the primary obligations which that treaty creates. It little affects this interest if the State whose first-level rights are injured by a breach fails to secure pecuniary reparation for its losses.

More difficult questions arise concerning the remedial rights which the holder of a second-level right can exercise for its own benefit. The assumption has sometimes been made that it should be entitled to claim pecuniary reparation for any losses which it might have suffered on account of the breach.⁴⁹ This assumption is probably mistaken; for the right to present such a claim is unlikely to do much to advance the cause of shoring up treaty obligations against erosion.⁵⁰

In contrast, there is good reason to suppose that second-level rights should include a right to require a State which has violated a treaty to give a guarantee against repetition of its wrongful conduct. As Graefrath observes, the giving of such a guarantee 'affirms continuation of the violated obligation and is aimed at protecting it against erosion that might threaten from frequent violations'.⁵¹ It is, of course, the purpose of the second-level rights under discussion to enable this very end to be achieved. At the same time, surely only one guarantee needs to be obtained from the wrongdoing State to attain the goal of protecting and upholding the treaty;

⁴⁹ The researchers who compiled the Harvard Draft Convention on the Law of Treaties seem to have thought so: see text at n. 75 below. Cf. Riphagen's views in relation to international crimes: loc. cit. above (n. 29).

⁵⁰ To deny the right to claim pecuniary reparation to all parties except those holding first-level rights to require performance of the obligation breached might well mean that no claim for redress can be made in respect of certain losses which are occasioned by the violation of a treaty. Such a state of affairs is by no means unusual, however, even when the loss is of a type which the obligation breached is meant to prevent: Riphagen's Fourth Report, p. 14 para. 74. For example, one of the purposes of Article 22 of the Convention on the High Seas is to facilitate international commerce. The losses which shipowners, exporters, importers, insurers and so on might predictably suffer in the event of its breach are thus precisely the type of thing which that article is meant to prevent. Notwithstanding, not all of the parties to the Geneva Convention are entitled to claim pecuniary reparation if that article is breached—even those States whose nationals might have sustained losses of the sort described—, it being commonly supposed that only the flag State of the vessel detained enjoys such a right: Riphagen's Fourth Report, p. 14 (n. 42); and Sinclair, *Yearbook of the International Law Commission*, 1984, vol. 1, p. 303; though note the discussion of the *SS Wimbledon* case at nn. 89–111 below. This assumption might be challenged. In particular, it might be contended that every party to a treaty should be able to claim pecuniary reparation in respect of losses which are caused by its breach, at least if they are of a type which it is the aim of the obligation breached to prevent. To do this lies beyond the scope of the present enquiry, however.

⁵¹ Loc. cit. above (n. 2), at p. 86; and see *ibid.*, at p. 87.

and, since the State whose first-level rights have been infringed by the breach is entitled to demand one, there appears to be little reason to entitle every other party to a multilateral treaty to seek similar guarantees from that State. However, the State which is injured in its first-level rights may not think that a breach has taken place; and, even if it does, it may still decide not to seek a guarantee against its recurrence. Moreover, that State's interpretation of the treaty may diverge from its proper construction, so that, if it seeks a guarantee from the State in breach, it may ask it to re-affirm its obligations in a way which does not meet the interest of the other parties to the treaty. Consequently, if treaty obligations are to be ensured adequate protection against erosion, some type of right to exact guarantees should probably be included among the second level of rights under discussion.

If a right to guarantees were to be included among second-level rights, the further problem would arise of whether it might be enforced by means of countermeasures. The practical importance of this question is evident. If a State vested with second-level rights were not to be entitled to take countermeasures against a wrongdoer in order to compel it to provide guarantees against a repetition of its unlawful behaviour, then its right to take such action against that State would cease once the latter had ceased to violate its primary obligation under the treaty; for, having put an end to that wrong, the wrongdoing State would owe no further obligations to the holder of a second-level right—the giving of guarantees aside—and the latter would have no further correlative rights to enforce. The only State which would then be entitled to take countermeasures against the wrongdoer would be the State whose first-level rights were infringed by the original breach. In contrast, if a State enjoying second-level rights were to be entitled to take countermeasures to enforce its right to guarantees, it would be able to continue to take such action even after the breach of the primary obligation had ceased. The right to take countermeasures would, therefore, be considerably broadened, if the latter option were chosen. Choice between these two alternatives requires balancing the importance of guarantees as a means of upholding treaty obligations against the risks which are involved in broadening the right to take countermeasures. Those risks will be considered below, but suffice it to say that they are probably decisively against the latter option.⁵²

There is little doubt that the second-level rights which have been described should be judicially enforceable. A judgment from an international tribunal interpreting the obligations under a treaty and declaring that they have been breached is likely to be most useful in reinforcing them against

⁵² See text at nn. 207–17, 223–30 and 233–9 below, noting especially n. 224. Despite the emphasis which he places upon guarantees as an important aspect of the remedial process in international law, Graefrath considers that countermeasures cannot be taken to secure them, except in the case of international crimes: *loc. cit.* above (n. 2), at p. 86. Even then, he seems to restrict the right to take such action to the State whose first-level rights were infringed by the crime: *ibid.*, at pp. 88 and 89.

erosion. Indeed, as Graefrath notes, '[t]his function is even more effectively fulfilled through a public declaration by an independent organ than through' a guarantee against repetition of the breach given by the wrongdoing State itself.⁵³ In view of its interest in upholding the treaty regime, every party to a multilateral treaty should be able to get such a judgment from an international tribunal.⁵⁴ Indeed, some commentators have gone further still, claiming that this interest justifies giving every party the right to seek a judgment on the proper interpretation of a treaty even when no breach has taken place.⁵⁵ Furthermore, the importance of suppressing breaches if the continued existence of a treaty is to be ensured justifies giving each party the right to obtain a judgment enjoining a wrongdoer to put an end to its violation of the treaty and resume performance of its primary obligations.

Whereas the probable content of this second level of rights is rather uncertain, their relationship with rights of the first level is relatively straightforward. Second-level rights are not auxiliary to first-level rights: they are not conferred on the parties to a treaty with the sole purpose of enabling them to assist those of their number whose first-level rights are infringed by a breach in the enforcement of their rights. On the contrary, each party is vested with them in recognition of its own individual and independent interest, severable from that of every other party, in upholding the legal regime which the treaty creates. This interest still exists even if the holder of a first-level right decides not to take any steps at all to enforce its rights against the wrongdoing State. Hence, that type of dependence between first- and second-level rights which characterizes 'auxiliary' rights and action by way of solidarity *stricto sensu* does not seem to exist. If the holder of a first-level right, State B, were mistakenly to think that State A's actions were not in breach of its treaty obligations, State C should, nevertheless, be entitled to exercise its second-level rights in defence of that treaty; similarly, if State B were to recognize that a breach had taken place, but failed to take any action to repress it. *A fortiori*, State C should not have to await any invitation from State B before acting.

However, even if the second-level rights under discussion enjoy a relationship with first-level rights different from that which prevails in the case of 'auxiliary' rights, it would be wrong to assume that no element of dependency is present in that relationship. As is made clear by Article 29(1) of Part 1 of the International Law Commission's Draft Articles on State

⁵³ Loc. cit. above (n. 2), at p. 86.

⁵⁴ *Contra*, Reuter, op. cit. above (n. 38), at para. 282n. Cf. the case of the *SS Wimbledon*, discussed at nn. 80–111 below, in respect of the claims of Italy and Japan.

⁵⁵ Rosenne, *The Law and Practice of the International Court of Justice* (1965), at pp. 518–19. The Permanent Court held that it could and would give a declaratory judgment in such circumstances in *The Interpretation of the Statute of the Memel Territory*, PCIJ, Series A/B, No. 47, p. 243. However, the Court's readiness to do this may be explained by the presence in the treaty there in issue of a jurisdictional clause conferring a right to obtain such a judgment on the States which instituted the proceedings. See text at nn. 83–8 below, especially at nn. 87–8, and at nn. 100–2 below.

Responsibility,⁵⁶ State A commits no wrong *vis-à-vis* State B when it performs acts which do not accord with its obligations to that State if State B has previously consented to the performance of those acts. If each party to a multilateral treaty were to have a fully independent right that State A perform its obligations under that treaty, then, unless it first sought the consent of every party to that agreement, State A would not be able to depart from its obligations thereunder, no matter how pressing the need or how extenuating the circumstance,⁵⁷ without incurring responsibility to some party or other, together with the accompanying prospect of being subjected to countermeasures. Likewise, State A would be unable to enter into a treaty with State B derogating from its obligations under a multilateral convention without first seeking the consent of every single party to that agreement.⁵⁸ There are, of course, some cases where each party to a treaty is given this type of control over every other party's performance of its obligations: labour conventions, for example. In cases such as this, each party is intimately concerned that the others perform the acts required by the treaty, since the failure of one State to do this may cause material prejudice to every other party. For example, if a State were to fail to apply certain safety standards in a particular industry, as required of it under a labour convention, it might gain a market advantage over other parties which scrupulously complied with those standards. Therefore, even if another party were to consent to that State's departure from its obligations, the latter's behaviour would still deleteriously affect the other parties to the treaty. In contrast, in most treaties, the interests of most parties are not materially affected if one of their number does not perform the acts which are required of it: only one party, or else a small number of parties, will suffer prejudice of a type which it is the purpose of the obligation in question to prevent. There is thus some reason to require the consent of this latter State—or, if there is a number of them, each of these States⁵⁹—if the State on which the obligation is incumbent is not to perform the acts required of it. Conversely, there is little reason to require the consent of any of the former

⁵⁶ For the text of draft Article 29, together with the Commission's Commentary, see *Yearbook of the International Law Commission*, 1979, vol. 2, part 2, at pp. 109–15.

⁵⁷ Bar the presence of a 'circumstance precluding wrongfulness', such as those mentioned in Chapter V of Part 1 of the Commission's Draft Articles on State Responsibility.

⁵⁸ As, for example, the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Cooperation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States, 13 November 1981: *UK Treaty Series*, No. 8 (1982) (Cmnd. 8470).

⁵⁹ In the case of a number of States, there is some reason to require their consent, but it does not follow that consent should in fact be required from each of them. There may be countervailing reasons which suggest limiting the need for consent to some of their number, and maybe to only one of them. Thus, if State A's warships were to board a merchant vessel flying the flag of State B, this might affect a number of States in a way which the obligation under Article 22 of the High Seas Convention is meant to prevent. Nevertheless, it is often assumed that only the consent of State B would be required for State A's warships to be able lawfully to take such a step: see n. 50 above. The complex question of whether, in such cases, first-level rights should be accorded to one State only or to several States is beyond the scope of the present enquiry.

group of States. Their interest is only involved should the State on which the obligation lies fail to obtain the approval of the State whose consent it needs to get in order lawfully to depart from its obligation. Its failure to perform the acts required of it would, in those circumstances, constitute a breach of the treaty, and, in view of its interest in upholding the treaty, each party would have an interest in putting an end to such wrongful conduct.

Consequently, in the majority of multilateral treaties, there should be a certain measure of dependence between first and second-level rights. If each State party to a multilateral treaty has a second-level right that State A perform its obligations under that treaty, then this right should only be exercisable and State A be liable to be required to resume performance of its primary obligations if State A has departed from one of its primary obligations without the prior consent of State B, the holder of the first-level right to its performance.⁶⁰

Of course, State A may fail to comply with its obligation without having first obtained the consent of State B, yet State B may then decide to 'waive the breach'. Should State C, the holder of a second-level right, be able to exercise its rights in such a case as this? State B's consent to State A's departure from its obligations only deprives the latter's acts of their wrongfulness if State A obtained State B's consent before performing them. In so far as State A does not obtain such prior consent, its departure from its obligations represents a wrong, even if State B later declares its indifference to what State A has done. By waiving State A's breach, State B does not make that wrong disappear: it merely declines to avail itself of the remedial rights which are vested in it as a consequence of that wrong. Of course, if State A's breach is a continuing one, State B's waiver will import consent to its continuing to disregard its primary obligations. What State A does from that moment on will, therefore, be deprived of its wrongfulness; but the acts which State A did prior to that moment will remain unlawful, notwithstanding.⁶¹

Consequently, State C's right to require State A to put an end to conduct which departs from its primary obligations should continue to exist and be exercisable for as long as State A's conduct violates those obligations. Concomitantly, this right, and, with it, the right to take countermeasures, should come to an end once State A's conduct ceases to constitute a breach, as it will once State B has consented to State A's continuing to depart from its obligations. Whether State C should continue to enjoy its right to receive guarantees from State A against a repetition of its wrongful conduct is a

⁶⁰ A second-level right should also be exercisable even when State B has consented to State A departing from its obligation, if State A proceeds to do this in a way other than that to which State B consented; for, in such a case, State A will have acted in breach of its obligation by exceeding the dispensation given to it.

⁶¹ See para. 16 of the International Law Commission's Commentary to draft Article 29: *loc. cit.* above (n. 56), at p. 113.

more difficult question. Even if State B decides to waive State A's breach, the fact will remain that State A has broken its obligations. This may seem a technicality where State A's departure from its obligations is a continuing one: State B's consent was merely not obtained at the proper time. On the other hand, the challenge to the treaty is more significant where State B has decided to do nothing about a breach which is already over and done with, and the right to obtain a clear acknowledgement of its obligations from State A might have an important role to play in protecting the obligation breached from erosion and precluding the development of a treaty-amending practice.

III. SOLIDARITY IN THE LEGAL MATERIALS

It is not surprising, given the pressures for their recognition, that certain manifestations of both of these second levels of rights can be discerned in international legal practice. However, these manifestations tend to be isolated, and it is extremely difficult to suggest that they show that second-level rights of either type have been accepted lock, stock and barrel into modern international law. The evidence can best be grouped into three categories, distinguished by the type of treaty rule in question and the seriousness of its breach.

(a) *Non-Serious Breaches of Multilateral Treaties*

The notion that any breach, no matter how trivial, of a multilateral treaty vests certain remedial rights in every one of the parties has received little support in international legal practice. The judgment of the International Court of Justice in the *South West Africa* cases of 1966 has often been pointed to as marking a firm and final rejection of the idea that any party to a treaty can claim its due performance. Dupuy, for example, describes that decision as 'le point culminant . . . de la doctrine classique, strictement inter-subjective, de l'intérêt à l'action'.⁶² Nevertheless, it would be wrong to say that no support for second-level rights can be found in the case of non-serious breaches of treaty.

The researchers who, in 1935, produced the Harvard Draft Convention on the Law of Treaties were of the opinion, reflected in Article 27(a) of that document, that, if one State were to commit a breach of its obligations under a multilateral treaty, then 'any other party to the treaty' would enjoy the right to put an end to its treaty relationship with that State.⁶³ The Com-

⁶² Dupuy, *Annuaire français de droit international*, 25 (1979), p. 539 at pp. 545-6.

⁶³ *American Journal of International Law*, 29 (1935), Special Supplement, at p. 1077. See, however, n. 73 below for a more precise formulation of the rule propounded in this article.

mentary accompanying Article 27 confirms that this right was thought to vest in every one of the parties to a multilateral treaty. While it was recognized that breaches of such treaties often affect certain parties more than others, occasioning loss to or infringing the rights of only some of their number, at the same time, it was thought that all of the parties are vested with the right to take the action described. The fact that some might not be prejudiced in their rights or in their material interests was considered relevant only in so far as it might deprive them of a possible reason for availing themselves of the remedy in question.⁶⁴ The degree of seriousness of the breach was thought to play a similar role, simply constituting one of the questions which a State would consider when deciding whether or not to exercise its right of treaty-termination.⁶⁵

The notion here at play appears to be what has been termed solidarity *lato sensu*. Each party to a multilateral treaty is accorded the remedial right described in view of its own, independent interest in upholding the law created by that treaty.⁶⁶ The Commentary to Article 27 thus envisages that each party will make its own decision whether to terminate its treaty relations with the wrongdoing State, unaffected by the decisions of the other parties, including the State whose first-level rights are infringed by the breach.⁶⁷

The right described in the Harvard Draft Convention—the right of a State to put an end to its relationship under a treaty with a State which has breached that agreement—is commonly supposed to be governed by the law of treaties, rather than by the rules of State responsibility.⁶⁸ Thus, Article 60 of the Vienna Convention on the Law of Treaties delineates and regulates this right at the same time that Article 73 provides that the Convention does not prejudge any questions of State responsibility which might arise on the breach of a treaty. Similarly, when he put before the International Law Commission a set of suggested articles outlining the content of State responsibility, Riphagen included among them a provision to the effect that they were solely intended to govern rights arising under the aegis of State responsibility and did not prejudge, much less regulate, any remedial rights which might arise under the law of treaties.⁶⁹ Although this exercise in classification can be criticized, it is nevertheless true that, what-

⁶⁴ Ibid., p. 1092. The Commentary constantly refers to the remedy of treaty termination being available to 'a party' or to 'the parties' to a multipartite treaty: e.g. *ibid.*, pp. 1078 and 1081.

⁶⁵ Ibid., p. 1081. Contrast Article 60 of the Vienna Convention on the Law of Treaties, 1969, discussed below at nn. 115–45.

⁶⁶ Its ability to terminate its treaty relations with the wrongdoing State serves to augment each State's power to enforce obligations created by that treaty, since the State in breach knows that it might be deprived for good of the benefits which that treaty provides—or at least those which come from the State threatening to take such action—if it does not put an end to its breach.

⁶⁷ Loc. cit. above (n. 64).

⁶⁸ Simma, *Österreichische Zeitschrift für öffentliches Recht*, 20 (1970), p. 5 at pp. 19–25; Waldock, *Yearbook of the International Law Commission*, 1963, vol. 2, p. 76; and de Luna, *ibid.* 1966, vol. 1, p. 62.

⁶⁹ Proposed draft Article 16(a): *ibid.* 1985, vol. 2, part 1, p. 15.

ever its source, the right to put an end to a relationship under a treaty with a State which has breached that treaty is something quite distinct from the right to subject that State to countermeasures:⁷⁰ different considerations justify its existence and determine its form. At the same time, it would be odd if, having considered each party to be vested with the former right on account of its interest in upholding the treaty, the authors of the Harvard Draft did not also accept that every party is also endowed with rights of the type considered in this paper under the heading of solidarity *lato sensu*, justified, as those rights are, by much the same factors.

The Commentary to Article 27 reveals that its authors considered every party to a multilateral treaty to have the right both to protest at its breach and to require the wrongdoing State to resume performance of its primary obligations.⁷¹ Moreover, these rights were thought to be judicially enforceable.⁷² Whether they were thought to be enforceable by means of countermeasures is less clear,⁷³ though the store which the Harvard researchers put on every party being able to secure compliance with the treaty might be thought to presuppose that countermeasures were considered available to this end.⁷⁴ Furthermore, it even seems to have been thought that any party to a multilateral treaty is entitled to claim pecuniary reparation from the wrongdoing State if it suffers loss on account of the breach, even if its first-level rights have not thereby been infringed.⁷⁵

Little evidence can be found in modern State practice to substantiate the views of the Harvard researchers. Kiss claims that France has, in the past, adopted the position that 'chaque partie contractante a également le droit

⁷⁰ In paragraph 6 of the Commentary on Article 57 of its Draft Articles on the Law of Treaties—the future Article 60 of the Vienna Convention—the International Law Commission remarks that the right to take the action detailed in that provision 'arises under the law of treaties independently of any right of reprisal': *ibid.* 1966, vol. 2, at p. 255.

⁷¹ *Loc. cit.* above (n. 63), at pp. 1080 and 1081.

⁷² *Ibid.*, p. 1081.

⁷³ Article 27(b) of the Draft Convention accords what appears to be a right to take countermeasures, at least in the form of suspending the performance of obligations which are owed to the wrongdoing State under the treaty which is breached. However, as described, this right arises in favour of a party only when it has decided to avail itself of the right accorded in Article 27(a). Under the Harvard Draft Convention, the right under Article 27(a) can only be exercised before an international tribunal: that is, the right of a party to terminate its treaty relationship with the wrongdoing State is more accurately described as a right to seek a judgment from an international tribunal declaring that relationship to be at an end, that judgment, and not the act of petitioning for it, terminating the treaty relationship in question. Consequently, a State in breach could prevent a State wishing to terminate their mutual treaty relationship from achieving that end by refusing to agree to take the issue before an international tribunal. Therefore, to give its right under Article 27(a) some substance, a party was to be accorded the right described in Article 27(b) so that it might compel the State in breach to agree to take the matter before a court. It also appears to have been thought necessary to enable the former State to take its own interim measures of protection whilst awaiting the judgment of that tribunal: *loc. cit.* above (n. 63), at pp. 1094–5. The recognition of the right to take countermeasures which can be found in Article 27(b) is, therefore, intimately connected with the proposals of the Harvard researchers to subject the right of treaty termination under Article 27 to complex procedural formalities. Whether a right to take countermeasures would exist outside of that framework is unclear.

⁷⁴ *Ibid.*, p. 1081.

⁷⁵ *Ibid.*, p. 1079. Contrast the conclusion reached at nn. 49–50 above.

d'imposer l'exécution du traité, même si les dispositions méconnues ne la concernent pas directement'.⁷⁶ However, the practice which he cites hardly justifies such a sweeping assertion. In 1925, Germany suggested to France the conclusion of a pact for their mutual security. France replied that any such pact would have to be without prejudice to the mutual rights and obligations of the two States under the Treaty of Versailles. Even in so far as the Treaty of Versailles imposed obligations on Germany relating to its behaviour towards States other than the Allied Powers, such as Poland and Austria, France maintained that the Allies still had the right to demand the performance of those obligations and to oppose any attempts which Germany might make to depart from them.⁷⁷ Much of the Treaty of Versailles possessed the character of a general settlement aimed at securing peace and a new European order. In view of the threat to the balance of power which might have ensued from their breach, it is probably correct to say that each of the Allies enjoyed a right that Germany perform obligations which fell into that category, including those which involved the performance of acts in relation to States other than the Allies.⁷⁸ However, such an arrangement of rights and obligations does not exist under every treaty; and, in the absence of further evidence, it is safest to conclude that the proposition asserted by France was intimately tied to the nature of the treaty there in question.

More cautiously, Simma observes that 'State practice seems sometimes to have endorsed the idea of solidarity or community interest', noting the existence of multilateral treaties which have included clauses apparently vesting in each party the right to take certain defined action against a party in breach.⁷⁹ The example which he cites—Article 4(4) of the Multilateral Agreement on Commerical Rights of Non-Scheduled Air Services in Europe⁸⁰—can be augmented by others. Under the Universal Postal Conventions, for instance, if a party breaches its duties in respect of freedom of transit, all the other parties are expressly granted the right to suspend their postal services with that party, regardless, apparently, of whether or not it was their mail which was denied transit.⁸¹ However, that some treaties explicitly provide for the existence of 'solidarity rights' hardly proves that similar rights vest under treaties which contain no such stipulation. Further evidence is required that those inserting clauses of this type considered

⁷⁶ Kiss, *op. cit.* above (n. 23), at p. 125.

⁷⁷ *Ibid.*, pp. 128–9. Germany had in fact committed no breach of its obligations in respect of Austria and Schleswig which were the true subject of this statement: *ibid.*, p. 129 n. 1.

⁷⁸ Cf. Fitzmaurice, *Yearbook of the International Law Commission*, 1957, vol. 2, at pp. 53, 54 and 55.

⁷⁹ *Loc. cit.* above (n. 68), at p. 49.

⁸⁰ *United Nations Treaty Series*, vol. 310, p. 229.

⁸¹ Article 35 of the Universal Postal Convention 1957 (*ibid.*, vol. 364, p. 3); and note Article 33 of the 1952 Convention (*ibid.*, vol. 169, p. 43) and Article 78 of the 1924 Convention (*League of Nations Treaty Series*, vol. 40, p. 19). Another instance of such a provision is Article 8 of the Statute on the International Regime of Maritime Ports, 1923 (*ibid.*, vol. 58, p. 301).

them merely to regulate the exercise of rights which would exist even in their absence; yet such evidence is almost totally lacking.

The notion of solidarity, at least solidarity *lato sensu*, may be found at work in the Statute of the International Court of Justice. Article 63 of that agreement confers on each party to a multilateral treaty the right to intervene in proceedings between other States before the International Court when the interpretation of that treaty is in question. Although its judgment will not bind a State which is not party to the litigation,⁸² a pronouncement of the International Court interpreting a treaty will have considerable effect on how that treaty is understood by all of the parties to it. Being interested in upholding and maintaining the law created by a treaty, each party has an interest in ensuring that the Court, when interpreting a treaty, does not come to erroneous conclusions on account of an incomplete review of the relevant evidence and legal arguments. Consequently, it is accorded the right to intervene in legal proceedings which raise the question of that treaty's correct interpretation and to present its own arguments on that issue.

Rosenne has argued that, not only does Article 63 grant a right to intervene in legal proceedings already under way between other States, but it also evidences the proposition that each party to a treaty can itself initiate proceedings to get a judgment on its correct interpretation: if a State's interest in upholding the correct interpretation of a treaty justifies the former, then it surely justifies the latter.⁸³ Moreover, if such a right existed, then, by analogy to Article 63, it could be exercised even if a breach of treaty took place which did not infringe the first-level rights of the State seeking the judgment. However, the existence of such a right must be open to grave doubt. The right to intervene in proceedings which have already been instituted by another is something quite different from the right to institute proceedings oneself.⁸⁴ In the former case, the proper interpretation of the treaty has already been called into question and there is an immediate prospect that the regime which it creates will be affected by the ensuing arguments and judicial examination. In the latter, even if the treaty has been breached, that prospect is much less immediate, since one breach, in and of itself, may have relatively little impact on the standing or the meaning of that treaty. The interest of each party in upholding the treaty and its correct interpretation is thus much more immediately in point in the former situation.⁸⁵ Moreover, to accord each party to a treaty a right to obtain a judgment on its correct interpretation would come close to recog-

⁸² Article 59 of the Statute.

⁸³ *Op. cit.* above (n. 55).

⁸⁴ Graefrath, *loc. cit.* above (n. 2), at n. 95.

⁸⁵ Furthermore, in the former situation, litigation is already afoot, whereas, in the latter, to vest a right in each party to a treaty to get a judgment on its proper interpretation would increase the prospects of international litigation, which might be thought to be undesirable. It should also be pointed out that Article 63 is weak material for an analogy of the type made by Rosenne, for it relates solely to proceedings before the International Court of Justice, and not to other international tribunals.

nizing the existence of an *actio popularis* under every multilateral treaty. The International Court rejected such a notion in the *South West Africa* cases of 1966;⁸⁶ and even Judge Jessup, who believed such a right to have vested under certain conventions,⁸⁷ recognized that this was because they included express provisions to that effect.⁸⁸

Lastly, it might be thought that some notion of solidarity, at least *lato sensu*, lies behind the judgment of the Permanent Court in the case of the *SS Wimbledon*.⁸⁹ The proceedings in that case were instituted conjointly by four States—the UK, France, Italy and Japan—, each of which was a party to the Treaty of Versailles. They claimed that Germany, by denying passage through the Kiel Canal to the *SS Wimbledon*, had committed a breach of Article 380 of that treaty, and they sought a declaration to this effect.⁹⁰ Each applicant thus asserted the right to get from the Permanent Court a judgment interpreting Article 380 and declaring that Germany had violated its obligations so defined. Although Germany doubted the right of three of the applicants—the UK, Italy and Japan—to seek such a judgment,⁹¹ the Permanent Court found that each of the applicants was indeed entitled to institute the proceedings which it had.⁹²

It is not difficult to conceive of both France and the UK as having been vested with a right that the *Wimbledon* be allowed passage through the Kiel Canal; for both of those States had a particular connection with that vessel—the former as the State of nationality of its charterers,⁹³ the latter as its

⁸⁶ Para. 88. The Court was hostile to the notion of a right which consists in the ability to claim the performance of an obligation solely by means of the institution of judicial proceedings. In order to seek a declaratory judgment on the content of an obligation—or a judgment enjoining its performance—the Court felt that there must be a right to claim its performance independently of any judicial proceedings: paras. 42, 48 and 65 (though note para. 66). As has been shown, there is insufficient evidence to suggest that every party to a multilateral treaty enjoys a right to claim performance of its obligations by extra-judicial means.

⁸⁷ *South West Africa* cases of 1966, pp. 373–81.

⁸⁸ *Ibid.*, pp. 387–8. Note, however, Article 35(1) of the UN Charter, which entitles any member of the UN to bring to the attention of the General Assembly or the Security Council a dispute of the kind referred to in Article 34, even if it is not involved in that dispute. Contrast Article 35(2), which confers a similar right on States not members of the UN, and which restricts that right to States which are party to the dispute.

If a protest at a breach made by a State whose first-level rights are not thereby infringed constitutes a potentially unlawful intervention in the affairs of the State in breach (see text at nn. 45–7 above), then an argument can be made that each party to a multilateral treaty is entitled to protest at its breach by relying on an analogy to Article 63. However, the fact that diplomatic negotiations are much more delicate than proceedings before the Court weighs against such an analogy, as does the fact that, when a case arises to which Article 63 applies, the State in breach and the State whose first-level rights were infringed will have already shown themselves willing to accept outside interference in the resolution of their controversy by taking the matter before the International Court.

⁸⁹ *PCIJ*, Series A, No. 1.

⁹⁰ *Ibid.*, p. 6. This was not the only claim for which judgment was sought in this case: see text at nn. 108–9 below.

⁹¹ *PCIJ*, Series C, No. 3, Additional Volume, at pp. 42 and 140; and see the Court's judgment at p. 20. Germany did not enter a formal plea in this respect, however.

⁹² Pp. 20 and 33.

⁹³ Pp. 6 and 18. The charterparty is reproduced in the pleadings: *ibid.*, at p. 119.

State of registry.⁹⁴ Italy and Japan, the other two applicants, enjoyed no such special relationship with the vessel, yet the Court admitted their suit. One possible explanation is that every State party to the Treaty of Versailles enjoyed a right to the performance by Germany of its obligations under Article 380. Such an interpretation has been adopted by Graefrath, who claims that the decision shows that rights to the performance of the obligations under a multilateral treaty are normally to be understood as vested in each and every one of the parties, at least in the case of 'general multilateral treaties which have as their object the regulation of the . . . common use of territories or resources'.⁹⁵ However, it was not the simple fact that each of the four applicants was a party to the Treaty of Versailles which moved the Court to recognize their right to bring proceedings against Germany. Rather, the Court based its decision on the ground that each of those States had a clear interest in the performance of Article 380, each having a merchant fleet flying its flag.⁹⁶ This might be thought to suggest that another form of solidarity was espoused by the Permanent Court, slightly different from that suggested by Graefrath. Though all of the parties to the Treaty of Versailles did not have a right *qua* parties that Germany comply with its obligations in respect of the *Wimbledon*, such a right was possessed by all those parties which were able to show an interest in the maintenance of the legal regime created by Article 380 to the extent that, were that regime to be eroded through breach or erroneous application, then vessels flying their flag might in the future suffer from violations or misapplications of that article. This is, after all, the classic underpinning of solidarity *lato sensu*, as has already been seen. However, it would be a mistake to believe that the *SS Wimbledon* provides any support for the notion that solidarity, even in this guise, is the norm under multilateral treaties, be they multilateral treaties in general or that particular category singled out by Graefrath.

Both the participants in the proceedings and the Court itself regarded the legal relations created by the relevant parts of the Treaty of Versailles as existing on two separate levels. Putting to one side Article 386, only certain States had a right to claim of Germany that it perform its obligation under Article 380 in respect of the *Wimbledon*, and at least some of the applicants in that case would not figure amongst them. In other words, Article 380 did not confer on each and every party to the Treaty of Versailles a right to its observance whenever it fell to be performed. On the other hand, Article 386 not only functioned as a normal jurisdictional clause, enabling this first

⁹⁴ Rather oddly, the fact that the *Wimbledon* flew the British flag is not made clear in any of the records of the case. It was several times said to be a British ship, but it is not clear whether this referred to the nationality of its owners, to its flag or to both. The Germans at one point even treated the vessel as being under the French flag: *ibid.*, vol. 1, at pp. 309–10. However, the Register of Shipping in London shows the *Wimbledon* as having been registered in the UK at the relevant time, as do the records of Lloyds of London and the Registrar General of Merchant Ships and Seamen in Cardiff.

⁹⁵ *Loc. cit.* above (n. 2), at pp. 74–5.

⁹⁶ P. 20; cf. also the reply of the applicants, *PCIJ*, Series C, No. 3, Additional Volume, at p. 64.

group of States to enforce their rights under Article 380 before the Permanent Court, but it also created a second level of right-holders, which, too, received the right to institute proceedings. This second group, which consisted of a different and wider set of States, was solely vested with the right to get a judgment from the Court interpreting disputed provisions of the Treaty relating to the Kiel Canal or declaring that one of those provisions had been breached. It was in virtue of their status as holders of rights on this second level that at least certain of the applicants instituted proceedings and the Court admitted their right to the declaratory judgment sought.

Thus, when claims were made outside the Court to the performance by Germany of its obligation under Article 380, the claimant States did not ground their rights to its observance on their status as parties to the Treaty of Versailles, nor on the fact that, as flag States, they were interested in ensuring compliance with that article. Rather, they felt it necessary to point to some facts which put them into a special and particular relationship with the incident at hand, picking themselves out both from the broad mass of the parties to the Treaty and from that large group of parties with merchant fleets under their flags. When, in 1920, the *SS Dorrit*, flying the Danish flag, was denied passage through the Kiel Canal in circumstances similar to those in the *Wimbledon* case,⁹⁷ France asserted a right to the performance of Article 380 in respect of that vessel, justifying its claim on the ground that it was the State of nationality of the cargo-owners.⁹⁸ Similarly, it was France which claimed performance of Article 380 in the *Wimbledon* incident itself during the diplomatic stage which preceded the litigation before the Permanent Court, this time relying on its status as the State of nationality of the charterers.⁹⁹

In contrast, when the Court confirmed the right of the applicants to seek a judgment on the interpretation and breach of Article 380, the justification proffered was not that those States enjoyed any special connection with the incident litigated. On the other hand, neither did it base this right on their status as parties to the Treaty of Versailles, nor on the simple fact that they were all parties which had merchant fleets under their flags and so had an interest in upholding Article 380. Rather, as Judge Jessup observed in his dissenting opinion in the *South West Africa* cases of 1966,¹⁰⁰ the Court held that this limited right was conferred on them by the express provision of Article 386 itself. That article vested a right in 'any interested Power' to take proceedings before the Permanent Court in the event of a breach of Article 380 or a dispute as to its proper interpretation. The Court applied simple methods of treaty interpretation to this clause. All the applicants were clearly 'interested' in violations of Article 380 and in its proper interpretation, having fleets under their flag which might in the future be

⁹⁷ *Ibid.*, Special Supplement, at pp. 3-4.

⁹⁸ *Ibid.*, p. 20.

⁹⁹ *PCIJ*, Series A, No. 1, at p. 6. See also n. 110 below.

¹⁰⁰ At p. 380.

affected by any weakening of that article or its erroneous application. They consequently fell within its terms and so had a right to get a judgment on those matters.¹⁰¹ What the Court did not do was to look to provisions of the Treaty other than Article 386, and, in particular, to Article 380, to see whether the four applicants each had a right to its performance conferred on them by that article, a right which Article 386 then gave them the right to protect by judicial means.¹⁰²

The existence of these two levels of rights becomes further evident on study of the debate which arose concerning Poland's application to intervene in the proceedings under Article 62 of the Court's Statute. As a precondition of the Court's consideration of its application, Poland needed to show that it had 'an interest of a legal nature' which was involved in the proceedings. In order to establish this, however, it did not point to any right to the interpretation of Article 380 conferred on it by Article 386. Rather, it relied on the argument that Article 380 itself vested it with a right to claim the performance of that provision in respect of the *Wimbledon*.¹⁰³ The UK, on the other hand, contended that Poland's application to intervene was inadmissible, maintaining that Poland had no right to the performance of Article 380 in relation to the *Wimbledon*, and that it, consequently, did not have 'an interest of a legal nature' involved in the case.¹⁰⁴ Yet, if Poland had no such right—and that in spite of its position as either the owner of the cargo aboard that vessel,¹⁰⁵ or else its consignee—,¹⁰⁶ then neither had some of the applicants alongside which the UK was bringing the proceedings, two of which definitely had no such close connection to the matter at hand. Although Poland and the UK were, therefore, in disagreement as to the admissibility of Poland's application to intervene, their arguments reveal that both of them considered rights to exist under the relevant parts of the Treaty of Versailles on two separate levels—the right to a declaratory judgment conferred by Article 386, which founded the right of Italy and Japan to institute proceedings, and rights to the performance of Article 380 conferred by that article itself and exercisable outside the judicial arena. Both Poland and the UK thought that the first type of right, though it might be used to institute proceedings before the Permanent Court, was insufficient to found a claim to intervene under Article 62 of the Court's Statute: only the second type of right was sufficient for that purpose. The

¹⁰¹ P. 20.

¹⁰² It is true that the Court in the *South West Africa* cases of 1966 was hostile to the notion of a right which consists solely in the power to seek and get a judgment from an international tribunal interpreting an obligation owed by another State under a treaty: see n. 86 above. However, Judge Jessup, in his dissenting opinion, showed that such rights have been created under several multilateral treaties: pp. 373–81; and see Schwelb, *Israel Year Book of Human Rights*, 2 (1972), p. 46. Indeed, the Court itself admitted this type of right might exist: para. 67.

¹⁰³ Pp. 9–10; and *PCIJ*, Series C, No. 1, at pp. 109–10 and 117–18.

¹⁰⁴ *Ibid.*, p. 107.

¹⁰⁵ *Ibid.*, No. 3, Additional Volume, at pp. 109–10.

¹⁰⁶ *Ibid.*, pp. 117–18.

two States solely disagreed as to whether Poland, as the consignee or owner of the *Wimbledon*'s cargo, could point to the possession of such a right.

The Permanent Court itself reasoned along these lines when dealing with Poland's application to intervene. Since the Court believed that each of the four applicants, by virtue of Article 386, had a right to seek a declaratory judgment, and since Poland was obviously possessed of the same right as they, it would have been easy to have admitted Poland's claim to intervene under Article 62 of the Court's Statute, if that type of right sufficed for the purpose of that article. However, the Court clearly felt that it did not and that a right of a different order was needed. Nevertheless, the Permanent Court managed to avoid deciding whether Article 380 conferred a right on Poland to require Germany to allow the *Wimbledon* to use the Kiel Canal; for it allowed Poland's intervention under Article 63 of the Court's Statute, putting aside its claim under Article 62.¹⁰⁷

Therefore, the case of the *SS Wimbledon* provides no support for the idea that the parties to a multilateral treaty each have a right to the observance of its obligations whenever they fail to be performed. Nor does it support as typical a kind of modified solidarity, whereby each State has a right to the performance of an obligation if it can show that failure to uphold and protect that obligation is likely to lead to a situation which might cause it prejudice in the future. Rather, it was solely by virtue of an express stipulation in the Treaty of Versailles that rights were deemed vested in States which had no obvious connection with the *Wimbledon* incident itself. Moreover, these rights were extremely limited in scope, being confined to a right to seek a judgment from the Permanent Court interpreting the provisions of the Treaty of Versailles which related to the Kiel Canal and declaring whether they had been breached.

One further aspect of the *SS Wimbledon* deserves mention here. The second-level rights which the Court found were conferred by Article 386 of the Treaty of Versailles were a clear manifestation of what has here been termed solidarity *lato sensu*. However, further elements of solidarity were also at play in that case, less evident, but no less interesting. Germany's denial of passage to the *Wimbledon* and the consequent delay and diversion of that vessel caused its French charterers to suffer financial loss, for which France made a claim for pecuniary reparation before the Court.¹⁰⁸ However, France was not the only State to seek compensation for this loss. The other three applicants each asked the Court to give judgment on this point and order Germany to indemnify France.¹⁰⁹ Their claim was that France had a right to be indemnified by Germany for the loss which its nationals had suffered, and that they were each vested with a right to require Germany to make such reparation to France, which right the Court should enforce. Three of the applicants were thus claiming what have here been

¹⁰⁷ Pp. 12-13.

¹⁰⁸ P. 30.

¹⁰⁹ Pp. 7-8, 16-17 and 30.

termed 'auxiliary' rights, or rights by way of solidarity *stricto sensu*. Although the Court did not explicitly comment on this claim, it appears to have assumed that it was ill-founded; for it treated France as the sole claimant in respect of the pecuniary reparation due from Germany.¹¹⁰ Nevertheless, the proceedings provide an interesting example of what form rights by way of solidarity *stricto sensu* might take.¹¹¹

In conclusion, when confronted by a breach of a multilateral treaty—at least when that breach is not a serious one—the parties enjoy none of the rights which have been described above as rights by way of solidarity *lato sensu* and which might enable them to protect that treaty against erosion and amendment. If the treaty is to be maintained and its original interpretation upheld, those States will have to depend on the efficacy of various other means: the action taken by the State whose first-level rights have been infringed by the breach; the protests which they themselves might direct at the wrongdoing State; their right to intervene in any proceedings before the International Court which involve the interpretation of the treaty; and their right to take measures of retorsion against the State in breach. Moreover, parties to a multilateral treaty will have to resort to these selfsame means if they wish to help one of their number to enforce its remedial rights against the wrongdoing State; for, just as they are accorded no special rights by way of solidarity *lato sensu*, no rights by way of solidarity *stricto sensu* vest in them either.

(b) *Serious Breaches of Multilateral Treaties*

The situation which arises under a multilateral treaty when its breach assumes a serious character presents a marked contrast with that prevailing in the event of a less important or minor breach. Much more evidence can be found in the relevant legal materials of a willingness to recognize that every State party is vested with at least certain remedial rights against a wrongdoing State when its breach is of a graver nature. Nevertheless, it would be wrong to exaggerate the backing for solidarity rights, either *stricto* or *lato sensu*, even in this type of case.

¹¹⁰ Pp. 30 and 32. This in fact underlines the existence of the two separate levels of rights which have already been discussed. Just as when claims were made outside the Court to the performance of Article 380, States felt it necessary to point to some special connection with the incident at hand, so, when claims were made before the Court to rights other than the simple right to seek a judgment interpreting Article 380 or declaring its breach, the Court disallowed such claims unless they were made by States with a particular involvement in the affair litigated. The simple status of a party or of a party with a merchant fleet under its flag only conferred a right to seek a judgment interpreting the treaty or ascertaining that it had been breached—and that by virtue of the inclusion of a provision in the treaty expressly conferring that right.

¹¹¹ Throughout this discussion of the *SS Wimbledon*, it has been assumed, for the sake of simplicity, that rights, whether under Article 380 or Article 386, only ran between States which were party to the Treaty of Versailles. The Court's judgment in fact indicates that Article 380 conferred rights on States which were not party to that treaty, and it is even possible that Article 386 did so, too: see Judge Jessup's dissenting opinion in the *South West Africa* cases of 1966 at p. 380. Even if this were so, however, the preceding discussion would not need to be modified in any material particular.

There is significant support, both in doctrine and in the work of private codification bodies, for the proposition that a serious breach of a multilateral treaty causes a right to vest in each of the parties to put an end to its legal relationship under that treaty with the wrongdoing State.¹¹² Giraud espoused this position in respect of certain categories of multilateral treaties in his report to the Institut de Droit International in 1961;¹¹³ and it has already been seen how the authors of the Harvard Draft Convention on the Law of Treaties adopted a similar stance, applying it to all types of multilateral treaties, and even extending it to cases in which the breach is less than serious in nature.¹¹⁴ This idea was subjected to the most careful scrutiny during the drafting of the Convention on the Law of Treaties of 1969.

In the course of the discussions conducted within the International Law Commission between 1963 and 1966, the view was put forward—for example, by Yasseen—that

... if a multilateral treaty is violated by any one of the parties, the breach might be said to affect the interests of all of the parties, for, by being a party to a multilateral treaty, a State has got an interest in the observance of the treaty by all of the parties.¹¹⁵

This opinion was widely shared among the members of the Commission,¹¹⁶ many of whom remarked the interest which each party to a treaty has in 'the maintenance of [the] general law and order' which that treaty creates.¹¹⁷ However, the conclusions which they drew from this interest differed sharply.

Several members of the International Law Commission maintained that the common interest of the parties to a multilateral treaty in protecting it against erosion justifies conferring on each of them the right to put an end to their relations under that treaty with a State which has breached it in a serious fashion. Among this group were Briggs,¹¹⁸ Castrén,¹¹⁹ Rosenne,¹²⁰

¹¹² See Simma, loc. cit. above (n. 68), at p. 48.

¹¹³ *Annuaire de l'Institut de Droit International*, 49 (1961), Part 1, at p. 33.

¹¹⁴ See text at nn. 63–5 above, though note n. 73. Chayes appears to have taken a similar view in an opinion which he gave while Legal Adviser to the State Department: Whiteman, *Digest of International Law*, vol. 14 (1970), pp. 474–5. However, his opinion relates to a specific type of treaty, in respect of which this proposition is much more widely accepted—the Nuclear Test Ban Treaty of 1963: see Article 60(2) (c) of the Vienna Convention.

¹¹⁵ *Yearbook of the International Law Commission*, 1966, vol. 1, p. 62.

¹¹⁶ Briggs, *ibid.*, p. 61; Cadieux, *ibid.*, p. 62; Castrén, *ibid.*, p. 61; de Luna, *ibid.*, p. 63; Rosenne, *ibid.*, p. 60; Tunkin, *ibid.*, p. 63; Verdross, *ibid.*, p. 61; and see the following note.

¹¹⁷ Jiménez de Aréchaga, *ibid.* 1963, vol. 1, p. 127. See also Tsuruoka, *ibid.*, p. 126. Jiménez de Aréchaga, however, recognized this interest to exist only in the case of 'multilateral treaties announcing general rules of law', giving by way of example the Geneva Convention on the Continental Shelf, 1958.

¹¹⁸ *Ibid.* 1966, vol. 1, p. 61.

¹¹⁹ In 1963, Castrén, represented by Jiménez de Aréchaga, proposed an amendment to Waldock's proposed draft article which stipulated the right of 'any other party' to put an end to its treaty relations with the State in breach: *ibid.* 1963, vol. 1, p. 120; and see Castrén's own remarks on this issue: *ibid.* 1966, vol. 1, p. 61.

¹²⁰ *Ibid.*, p. 60; although he later changed his opinion on this matter: *ibid.*, p. 128. Akehurst suggests that Rosenne's apparent about-face is explained by the fact that, in his original statement, he was not supporting the conferring of a right on each party to end its treaty relations with the State in breach,

possibly Yasseen,¹²¹ and, most prominently, the Special Rapporteur on the Law of Treaties himself, Sir Humphrey Waldock.

Waldock recognized that a serious breach of a multilateral treaty generally affects some of the parties more immediately than it does others and in a different way. Such a violation usually infringes the rights of only some, and often only one, of the parties.¹²² Moreover, whereas a breach may cause parties other than those whose rights are infringed to suffer material damage or financial loss, they are, once more, likely to represent only a limited number of the parties to the treaty in question.¹²³ Nevertheless, Waldock noted that a grave breach of a multilateral treaty has the potential of 'seriously disturbing the [treaty] regime',¹²⁴ prejudicing the interest shared by every one of the parties in ensuring compliance with that treaty and upholding the obligations which it creates.¹²⁵ By virtue of this common interest, he argued, every party to a multilateral treaty should enjoy a right to its observance by every other party¹²⁶—a right which can only be described as existing on a level separate from those rights which he had already described as enjoyed by certain of the parties only. In 1963, in his Second Report to the International Law Commission on the Law of Treaties, Waldock consequently proposed for adoption a provision—draft Article 20(4)(a)—which, upon the commission by one party of a 'material breach'

but was rather criticizing the draft article proposed by Waldock in so far as it lent itself to an interpretation sympathetic to such a right: *loc. cit.* above (n. 16), at p. 12. This rationalization, however, ignores the fact that Rosenne pointed to a body of evidence to prove that his interpretation of Waldock's suggested article was well-founded 'as a matter of principle', and concluded that he therefore favoured rejecting the amendments to that provision proposed by the Netherlands and the USA which sought to exclude that interpretation.

¹²¹ *Loc. cit.* above (n. 115).

¹²² *Yearbook of the International Law Commission*, 1963, vol. 2, at pp. 77 and 131; and *ibid.* 1966, vol. 2, at pp. 35–6.

¹²³ 'At the same time, it is necessary to remember that the interests of one party may be seriously affected by a violation of the rights of another party': *ibid.*, p. 36. These 'interests' are distinct and separate from the general solidarity interests which Waldock proceeds to recognize in the passage which follows the words quoted and which is discussed below. This is made clear by the opposition between the words 'one party' in the sentence quoted and the phrase 'every party' in the following sentence, which discusses solidarity. It is also underlined by the fact that the latter sentence begins 'And, also', thus emphasizing the distinctness of the two topics addressed.

In this important passage of his Fifth Report on the Law of Treaties, Waldock outlines a view wherein not only a State whose rights are infringed by a serious breach of a treaty, but also a State which thereby suffers damage or loss is vested with a right to suspend its treaty relations with the State in breach. He then goes a step further, expanding this right to all of the parties to a multilateral treaty. This last extension of the right was not adopted by the Commission: see text at nn. 142–5 below. However, his first extension of the right, granting it not only to the States whose rights are infringed by the breach but also to States which have thereby suffered loss, was not rejected, remaining to be embodied in Article 60(2)(b) of the Vienna Convention, which confers the right to suspend its treaty relations with the wrongdoing State on any State which may be 'specially affected' by the breach. This provision thus marks a notable departure from the approach, presupposed throughout this paper, that remedial rights under international law only vest in those States which have a right to require performance of the obligation which is breached: see n. 1 above.

¹²⁴ *Ibid.* 1963, vol. 1, p. 245.

¹²⁵ *Loc. cit.* above (n. 123).

¹²⁶ *Ibid.*

of a multilateral treaty, entitled 'any other party' to put an end to its relations under that treaty with the wrongdoing State.¹²⁷

Although the predominant consideration which motivated Waldock to make this proposal, and which moved several members of the Commission to support him, was the importance of facilitating action by way of solidarity *lato sensu*, it is important to recognize the store which the Special Rapporteur also placed on making possible action by way of solidarity *stricto sensu*. Thus, when proposals were made to limit the right to suspend treaty relations with the wrongdoer to States whose first-level rights were infringed by the breach, Waldock sought to counter them, not just by pointing to the general interest of the parties to a multilateral treaty in securing its observance,¹²⁸ but also by arguing that

. . . it seems undesirable to go too far in discouraging the other parties from showing solidarity with the party directly injured by the breach.¹²⁹

A State whose rights are infringed by a serious breach of a treaty or which is thereby occasioned damage or loss naturally has greater reason to exercise the right to suspend its treaty relations with the wrongdoing State.¹³⁰ However, it might need assistance in enforcing its other remedial rights against that State, especially its right to pecuniary reparation, and, to make this assistance possible, Waldock thought it important to allow other parties to the treaty to withhold from that State, if necessary, the benefits which that agreement affords.¹³¹

Waldock's proposed draft Article 20(4) (a) attracted little dissent within the Commission in 1963.¹³² The Special Rapporteur reported the Drafting Committee's support for the proposition which it embodied,¹³³ and draft Article 20 as a whole was adopted by the Commission without a dissenting vote.¹³⁴ However, whilst sharing the view that each of the parties to a multilateral treaty has an interest in its observance, several members of the International Law Commission disagreed with the conclusion which

¹²⁷ *Yearbook of the International Law Commission*, 1963, vol. 2, p. 73. For Waldock's brief commentary on this provision, see *ibid.*, p. 77.

¹²⁸ *Ibid.* 1966, vol. 1, p. 59.

¹²⁹ *Ibid.*, vol. 2, p. 36.

¹³⁰ *Ibid.* Cf. the views expressed by the authors of the Harvard Draft Convention: see text at n. 64 above.

¹³¹ Cf. Waldock, *Yearbook of the International Law Commission*, 1966, vol. 1, p. 65. Note also text at nn. 146-9 below.

¹³² The only voice of dissent was that of Verdross: *ibid.* 1963, vol. 1, p. 294.

¹³³ *Ibid.*, pp. 247 and 294-5. The relevant subparagraph thus emerged unchanged in any relevant particular from its two examinations by the Drafting Committee: *ibid.*, pp. 245 and 294.

¹³⁴ *Ibid.*, pp. 247 and 295. Several alterations to Waldock's original proposed draft article were made, and his paragraph (4)(a), now paragraph (2)(a), underwent some drafting changes, which, however, did not affect its substance in any relevant particular. Renumbered draft Article 42, the article was then included in the Commission's Report to the UN General Assembly: *ibid.*, vol. 2, p. 204. The Commission's Commentary at first appears to restrict the right of treaty suspension to States 'directly affected' by a serious breach: *ibid.*, p. 205; but it is later made clear that every party to a multilateral treaty enjoys this right: *ibid.*, p. 206.

Waldock and some of the other members drew from this. Consequently, at the Commission's 1966 session, opposition arose to the notion that every party to a multilateral treaty should be entitled to put an end to its relations under that treaty with a State which breaches it in a 'material' fashion. This group, which included Cadieux,¹³⁵ de Luna,¹³⁶ Tunkin,¹³⁷ and Verdross,¹³⁸ and which was later joined by Rosenne,¹³⁹ advocated restricting this right to those States whose first-level rights were infringed by the breach—a step which, in many cases, would limit this right to only one, or else but a few, of the parties to a multilateral treaty. This proposal was also espoused by two of the States which commented on the Commission's work: the Netherlands¹⁴⁰ and the USA.¹⁴¹

There was, therefore, a marked difference of opinion within the International Law Commission between, on the one hand, those who considered that the interest which every party to a multilateral treaty has in its observance justifies endowing it with the right to suspend its relations under that treaty with a State which violates it in a serious manner, and, on the other hand, those who, while accepting that the parties to such a treaty share this kind of interest, thought that this does not justify giving each of them the right to take this type of action.¹⁴² It was the latter camp which emerged victorious. Thus, under Article 57(2) (b) of the Draft Articles on the Law of Treaties adopted by the Commission in 1966,¹⁴³ the right to suspend relations under a multilateral treaty with a State which commits a 'material breach' is conferred only on a party which is 'specially affected by the breach',¹⁴⁴ the adverb 'specially' differentiating the State or States entitled to this remedy from the broad mass of the parties each of which suffers an

¹³⁵ Ibid. 1966, vol. 1, p. 62. This appears to mark a change from the view which he had taken in 1963, supportive to Waldock's position: *ibid.* 1963, vol. 1, p. 247. However, it is possible that, in this earlier statement, Cadieux was merely describing and analysing the proposition contained in Waldock's suggested draft article, rather than espousing it.

¹³⁶ Ibid. 1966, vol. 1, p. 63. In 1963, de Luna expressed opinions which might be taken to support Waldock's point of view, quoting, *inter alia*, several multilateral treaties which contain provisions expressly conferring remedial rights on all of the parties in the event of their breach (cf. text at nn. 79–81 above): *ibid.* 1963, vol. 1, pp. 128–9.

¹³⁷ Ibid. 1966, vol. 1, p. 63; although he is probably more accurately described as not opposing this view rather than actively advancing it. However, in 1963, he had talked of 'the other parties' to a multilateral treaty being entitled to the remedy under discussion: *ibid.* 1963, vol. 1, p. 128.

¹³⁸ Ibid. 1966, vol. 1, p. 61; and see n. 132 above.

¹³⁹ Ibid., p. 128; though cf. n. 120 above. It is also possible that Yasseen belonged to this group: *loc. cit.* above (n. 115).

¹⁴⁰ *Yearbook of the International Law Commission*, 1966, vol. 2, p. 34.

¹⁴¹ A/C.6/SR.784, p. 20; *Yearbook of the International Law Commission*, 1966, vol. 2, pp. 34–5. The amendment which the USA proposed, and which the Netherlands supported, in fact conferred the right of treaty suspension not only on those States whose first-level rights are infringed by the breach but also on those States whose obligations are 'adversely affected' thereby.

¹⁴² Waldock, summarizing the debate within the Commission at its 1966 session: *ibid.*, vol. 1, p. 64.

¹⁴³ Ibid., vol. 2, p. 253; *United Nations Conference on the Law of Treaties, Official Records*, vol. 3, p. 73.

¹⁴⁴ Except in the case of one special category of treaties, defined and regulated by paragraph (2)(c), under which every party enjoys this right in the event of a 'material breach'; see also n. 114 above.

identical harm to its residual interest in the observance of the treaty.¹⁴⁵ At the Vienna Conference, no attempt was made to go back on this decision, and the Commission's provision, renumbered Article 60(2) (b), was incorporated unchanged into the Convention on the Law of Treaties.

Notwithstanding Article 60(2) (b), the Vienna Convention in fact affords considerable support for the lawfulness of action by way of solidarity in the event of a serious breach of a multilateral treaty.

First, Article 60(2) (a) (i) clearly has its justification in considerations of solidarity, both *stricto* and *lato sensibus*. Under this provision, the right to terminate or suspend relations under a multilateral treaty with a State which has committed a material breach of that agreement is conferred on all of the parties to that treaty, whether or not their first-level rights were infringed by that wrong and whether or not they were thereby occasioned any loss or damage—in short, regardless of whether they were 'specially affected by the breach' in the sense of Article 60(2) (b). However, while Article 60(2) (b) vests a right severally in each 'specially affected' State, empowering it to make its own, independent decision whether to suspend its treaty relations with the wrongdoer, the right granted by Article 60(2) (a) (i) is vested in the parties as a group and can only be exercised by them collectively and by means of a unanimous decision. This is likely to pose considerable problems when it comes to using it. Indeed, the difficulties involved in establishing, to the satisfaction of all of the parties, that the wrongdoing State has breached its obligations under the treaty and that this breach can properly be qualified as 'material', not to mention the problem of mobilizing universal support for the invocation of this right, significantly limit its value, at least in the case of treaties with large numbers of parties. Nevertheless, if these obstacles can be overcome, the provision does make it possible for the parties to take action to uphold a treaty by ejecting from it a State whose breach indicates that it cannot continue to participate in the agreement without threatening its continued existence.¹⁴⁶ Moreover, it empowers the other parties to provide concerted assistance to a State which

¹⁴⁵ Waldock, *Yearbook of the International Law Commission*, 1966, vol. 1, pp. 64 and 128. An infelicity in the drafting of paragraph (2)(b) might be noted. Paragraph (3) defines a 'material breach' to include, not just the failure of a State to comply with its obligations under a treaty in a way which can be classed as serious, but also an attempt by a party to terminate or suspend its relations under that treaty when it has no legal warrant for doing so. If a State were to do the latter in respect of its treaty relations with all of the other parties, it would be difficult to describe all of the other parties as 'specially affected', although each of them clearly is then endowed with the right to suspend its treaty relations with that State—at least, in most cases. 'Specially affected' thus does not refer to a subset of the parties which can be said to be affected to a greater degree than the rest, or are affected in a way in which others are not. Rather, it refers to the interest which is affected, 'specially affected' meaning affected in an (undefined) way over and above the impairment of the basic and residual interest in the observance of the treaty which always occurs when a breach is committed or a State denies being bound by a treaty without legal warrant. In a way, then, the slightly awkward wording of paragraph (2)(b) reinforces, rather than undermines, the interpretation propounded in the text.

On the type of interest which, when it is prejudiced by a material breach, gives the State which enjoys it the status of being 'specially affected', see n. 123 above.

¹⁴⁶ Waldock, *ibid.* 1963, vol. 1, pp. 294–5, and *ibid.* 1966, vol. 2, pp. 35–6.

is 'specially affected' by a material breach, providing them with at least one means to help it enforce its remedial rights against the wrongdoing State.¹⁴⁷ The proposal to include such a provision in its Draft Articles on the Law of Treaties consequently met with little opposition in the International Law Commission, even among those members who were unwilling to confer on each of the parties individually a right to take action against a wrongdoing State in defence of these same interests.¹⁴⁸ To this extent, at least, it seems to have been thought 'useful to emphasise solidarity in the face of a serious breach'.¹⁴⁹

Secondly, further traces of support for solidarity, at least *lato sensu*, are evident in certain parts of the Vienna Convention which deal with matters other than breach. Several provisions are founded on the notion that each party to a multilateral treaty has an interest that the object and purpose of that treaty is advanced and attained. To enable it to protect this interest, each party is accorded certain rights to require the other parties not to engage in activity which might thwart the accomplishment of the treaty's object or frustrate the fulfilment of its purpose. For example, if some of the parties to a multilateral treaty are minded to enter into an agreement modifying its application in their mutual relations, another party to that treaty is entitled by Article 41(1) (b) (ii) to insist that the agreement is not concluded if, *inter alia*, the modification which it would make to the multilateral treaty is incompatible with the attainment of its object and purpose. An agreement among certain of the parties to a multilateral treaty to suspend its operation in their mutual relations can be prevented on similar grounds under Article 58(1) (b) (ii). A party to a multilateral treaty, therefore, has a legal interest in the content of the mutual relations under that treaty of two other parties, to the extent that it can require that they not take on a form which is likely to impair the realization of that treaty's object and purpose.

A similar interest underlies Article 19(c) of the Vienna Convention. This provision renders inadmissible a reservation which is inconsistent with a treaty's object and purpose.¹⁵⁰ Consequently, if a State subjects its consent to be bound by a treaty to such a reservation, each contracting party is

¹⁴⁷ Waldock, *ibid.*, p. 36.

¹⁴⁸ Verdross opposed such a provision, however: *ibid.* 1963, vol. 1, p. 294. Of the two States which commented on the proposal, the USA opposed it, while the Netherlands supported it: *loc. cit.* above (n. 141 and n. 140 respectively). No proposal was introduced at the Vienna Conference to delete this provision or to amend it in any way relevant to the present discussion.

The fact that the exercise of this right requires a unanimous collective decision of the parties to the treaty, although making its invocation difficult, also operates as a safeguard against abuse: see text at nn. 219–20 below. This probably accounts for some of the support which this right attracted in contrast with Waldock's proposals for the future Article 60(2)(b).

¹⁴⁹ Waldock, *Yearbook of the International Law Commission*, 1963, vol. 1, p. 247; and see Waldock's report on the work of the Drafting Committee at the Commission's 1966 session: *ibid.* 1966, vol. 1, p. 128.

¹⁵⁰ In so far, of course, as the test of admissibility created by that paragraph applies to the instant treaty.

entitled to insist that that State be excluded from the treaty altogether, even *vis-à-vis* those contracting parties which might be prepared to accept mutual relations under the treaty with that State in a form modified by its reservation.¹⁵¹ The interest of each of those States in the attainment of the object and purpose of the treaty warrants that the mutual relations of none of them assume a form inconsistent with that goal. Article 19(c) accordingly renders void and without legal effect the expression by a State of its consent to be bound by a treaty in so far as it is made subject to a reservation which conflicts with that treaty's object and purpose.¹⁵²

Taken together, these various provisions of the Vienna Convention are suggestive of a general principle that the performance of acts tending to thwart the accomplishment of the object and purpose of a treaty should be prevented by placing the legal means to avert them in the hands of each of the parties to that treaty.¹⁵³ They also suggest that one particular form

¹⁵¹ This follows from the very notion of admissibility introduced by Article 19(c). In this respect, the Vienna Convention follows the opinion of the International Court in the *Reservations to the Convention on Genocide* case, which expressly countenanced that, by taking the issue on to the jurisdictional plane, a party might seek to have a State formulating a reservation inconsistent with the object and purpose of that convention excluded altogether from participation in it: *ICJ Reports*, 1949, p. 15 at p. 26. The UN Secretary-General has acted on a similar view of the law while fulfilling his responsibilities as the depositary of the Vienna Convention itself. When determining whether he should declare that the Convention had entered into force, he checked with those States which had objected to reservations made by States ratifying or acceding to the Convention to see whether their objections were based on the ground that those reservations were inadmissible. This was presumably since, if they were, then, from the point of view of those objecting States, the States which had formulated the reservations in question would have been excluded from participation in the Convention. A difference of opinion might then have come into existence, between those who thought that the reservations were incompatible with the object and purpose of the Convention and those who disagreed, as to whether the Vienna Convention had in fact entered into force: the latter would have counted the ratifications of the reserving States for the purposes of Article 84(1), and the former would not—subject to a possible argument that even the former should have counted them by virtue of Article 20(4)(c). On this difficult and intricate incident, see Imbert, *Annuaire français de droit international*, 26 (1980), p. 524.

A State can become a party to a treaty, even subject to a reservation incompatible with its object and purpose, if all of the contracting parties agree to this, being prepared to waive compliance with the admissibility test in respect of it: Imbert, *Les Réserves aux traités multilatéraux* (1979), at p. 83.

¹⁵² Several other provisions of the Vienna Convention reflect the idea that the relations of two States under a multilateral treaty are sometimes of interest to the other parties and should therefore be subjected to some form of legal control. Thus, the remedy which is granted by Article 60(2)(b) to a State which is 'specially affected' by a material breach of a multilateral treaty is limited to the suspension of its relations thereunder with the wrongdoing State, and does not extend as far as their termination. The International Law Commission felt the latter too drastic a remedy, pointing to the effect which termination of the treaty relations between two States might have on the interests of the other parties: *Yearbook of the International Law Commission*, 1966, vol. 2, p. 255.

Article 65(2) also deserves mention. On a literal interpretation of this provision, any party to a multilateral treaty can object to an attempt to invoke the grounds of treaty-termination or treaty-suspension laid down in Part V, even if the State invoking them is seeking to end its treaty relations only with some third State, and even if that third State is content that this should happen: Simma, loc. cit. above (n. 68), at p. 80 n. 345; Riphagen's Seventh Report on State Responsibility, A/CN.4/397, p. 8 (para. 3 of the Commentary to Riphagen's proposed draft Article 2 of his suggested Part Three of the Commission's Draft Articles on State Responsibility).

¹⁵³ The legal recognition of this interest has profound ramifications, since it seems to be accepted that treaties of all types possess an object and a purpose, including those multilateral treaties which are, in nature, but a conglomeration of bilateral agreements. It is noteworthy in this connection that the

which this principle takes is that of an obligation, incumbent on the parties to a multilateral treaty, not to frustrate its object and purpose. Failure to comply with this duty—as, for instance, by concluding an agreement prohibited by Article 41(1) (b) (ii)—infringes the rights of each of the other parties to the treaty, constituting a wrong which they are all entitled to suppress.¹⁵⁴

Just such a principle lies at the heart of the judgment of the International Court of Justice in the case on *Reservations to the Convention on Genocide*.¹⁵⁵ As the Court there remarked,

no contracting party is entitled to frustrate or impair, by unilateral decisions or particular agreements, the purpose and *raison d'être* of a convention.¹⁵⁶

The Court applied this general principle, not to create obligations and rights, but to regulate the validity and effect of certain acts: a reservation which would modify the Convention on Genocide in such a way as to impair the attainment of its object and purpose was invalid and a State which insisted on making its consent to be bound subject to such a condition was unable to become a party to that treaty.¹⁵⁷ There is no suggestion that a State formulating such a reservation committed any wrong or that a contracting party which treated such a State as having properly and effectively expressed its consent to be bound breached any legal obligation.¹⁵⁸ At the same time, there are more ways of thwarting the object and purpose of a treaty than by formulating a reservation, and, while some of those means may be controlled and suppressed by rules which invalidate particular types of acts, others are more aptly controlled by the recognition of obligations and correlative rights. Thus, frustration of the object and purpose of a multilateral treaty by the conclusion of what the Court called 'particular agreements' is prohibited by means of rules which make it wrongful to enter into such arrangements, as has already been seen.¹⁵⁹

International Court in the *Nicaragua* case thought of the Treaty of Friendship, Commerce and Navigation between Nicaragua and the US as having an object and purpose, although it was, of course, only a bilateral treaty: paras. 273 and 275; and see text at nn. 161–3 below.

¹⁵⁴ Riphagen suggests that Articles 41 and 58 of the Vienna Convention create a sort of *jus cogens* between the parties to a multilateral treaty: Fourth Report, p. 22 n. 67. However, neither Article 53 nor those articles themselves contain any suggestion that agreements concluded in disregard of them are void. The natural inference is rather that such agreements put the States concluding them in breach of international law *vis-à-vis* the other parties to the multilateral treaty which is being amended or suspended: cf. Article 30(5). Nevertheless, if an expression of consent to be bound by a treaty can be rendered void by virtue of being subject to inadmissible reservations, as can an attempt by a contracting party to accept that reservation and so agree to relations under the treaty with the reserving State on those modified terms, then, it might be wondered, why cannot an agreement or treaty which is rendered inadmissible on the very same ground by Article 41 or Article 58 also be deemed void?

¹⁵⁵ Loc. cit. above (n. 151). Cf. Dupuy, loc. cit. above (n. 62), at p. 544.

¹⁵⁶ P. 21.

¹⁵⁷ Pp. 24 and 26.

¹⁵⁸ The Court does talk of there being a duty to assess reservations by the test of whether they are inconsistent with the object and purpose of the Convention: pp. 24 and 26–7. However, there is no hint that misapplication or non-application of this test is an unlawful act.

¹⁵⁹ See text following n. 149 above, and text at n. 154 with accompanying note.

Moreover, as the Court points out, the object and purpose of a treaty may just as well be impaired by the 'unilateral decisions' of one of the contracting parties as by 'particular agreements' concluded among them.¹⁶⁰ In so far as one such 'unilateral decision' which a party might take is to commit a serious breach of its treaty obligations, the most obvious way in which to apply the principle espoused by the Court and avert such a threat to the *raison d'être* of a treaty is to recognize a basic, underlying obligation incumbent on the parties not to commit such a breach.

Thirty-five years later, in its judgment in the merits phase of the *Nicaragua* case,¹⁶¹ the International Court confirmed the existence of the obligation at which it had previously hinted. Nicaragua there alleged that the US, by attacking its ports, mining its harbours and imposing a general embargo on trade with it, had committed a breach of its obligation under customary international law¹⁶² not to deprive the Treaty of Friendship, Commerce and Navigation between those two countries of its object and purpose. The Court upheld this contention.¹⁶³ Although this finding related to a bilateral treaty, there is no reason why the rule adopted by the Court should not also encompass multilateral treaties.

At the same time, certain passages of the Court's judgment in the *Nicaragua* case might be thought indicative of a certain unwillingness to recognize that even serious breaches of some of the most important obligations of international law can infringe the rights of States other than the immediate victims of those wrongs; and, while these statements address breaches of customary law rather than violations of multilateral treaties, the attitude which they disclose is nonetheless revealing.

Having found that the US, by training, arming, equipping, financing and supplying the 'contra' rebels, had breached its obligations to Nicaragua not to intervene in its affairs and not to use force against it, and having dismissed the argument that these acts were justified as an exercise by the US of the right of collective self-defence against an armed attack launched by Nicaragua on El Salvador, Costa Rica and Honduras, the Court proceeded to examine other possible arguments in favour of their legality.¹⁶⁴ In particular, the Court enquired whether the US was entitled to perform these acts as countermeasures against Nicaragua on the assumed ground that Nicaragua had committed breaches of the obligation which it owed to its neighbours not to intervene in their internal affairs, and possibly even breaches of the duty it owed to those States not to use force against them.¹⁶⁵ The Court held that State C does not have the right to take countermeasures against State A which involve the use of force on the ground that

¹⁶⁰ See also Article 18 of the Vienna Convention, paragraph (b) of which at least is reflected in the general principle articulated by the Court.

¹⁶¹ Loc. cit. above (n. 37).

¹⁶² Para. 270; and see para. 273.

¹⁶³ Paras. 275, 276 and 292(10).

¹⁶⁴ Para. 201.

¹⁶⁵ Para. 210.

the latter has committed an unlawful act, and even unlawfully used force, against State B.¹⁶⁶ This is not a surprising conclusion: it is widely held that there is no right, even in the State which is the direct 'victim' of an international wrong, to take countermeasures against its perpetrator which involve the use of force.¹⁶⁷ In two passages of its judgment, however, the Court seems to go further. First, the Court remarks that, assuming Nicaragua to have breached the rules prohibiting intervention and the use of force,

[t]he acts of which Nicaragua is accused . . . could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and *particularly* could not justify intervention involving the use of force.¹⁶⁸

In a later passage, the Court also states that it has 'disposed of the suggestion of a right to collective counter-measures in face [*sic*] of an armed intervention'.¹⁶⁹ In both of these excerpts, the Court apparently treats the rights to the performance of two of the most fundamental rules of international law—the rules prohibiting intervention and the use of force—as vested in one State only, the putative victim of those unlawful activities, thus rejecting the notion that other States enjoy a right to take any countermeasures at all, much less countermeasures involving the use of force, against a State which breaches those rules in a serious way.

However, it is unwise to place too much store on these two isolated passages, which should, moreover, be looked at in their context. The only question which the Court had to consider in the current proceedings was whether the unlawful acts of the US could be deemed legal by virtue of the existence of a right, vested in a State other than the immediate victim of an unlawful intervention or use of force, to take forcible countermeasures against the perpetrator of such wrongs. The Court was not faced with the wider issue of whether the US could take countermeasures which did not involve the use of force, nor did it ask itself this question.¹⁷⁰

¹⁶⁶ Paras. 211, 249 and 252.

¹⁶⁷ See, for example, the International Law Commission's Commentary to Article 30 of Part 1 of its Draft Articles on State Responsibility: *Yearbook of the International Law Commission*, 1979, vol. 2, part 2, pp. 116 and 118. Of course, if a State is the victim of an unlawful use of force which goes so far as to represent an armed attack against it, then it can use force in self-defence against the perpetrator. On the distinction between countermeasures and self-defence, see n. 37 above.

¹⁶⁸ Para. 249 (emphasis added).

¹⁶⁹ Para. 257.

¹⁷⁰ Nicaragua did allege that the USA had committed several unlawful acts which did not involve the use of force. However, she went on to allege that these should be considered, together with several unlawful acts which did involve the use of force, as forming a single general course of conduct, which was unlawful on the grounds that it deprived the Treaty of Friendship, Commerce and Navigation between the two countries of its object and purpose. This is how the Court in fact examined those acts: para. 276. No illegality was thus alleged or found on the part of the USA which consisted solely in the commission of non-forcible acts and which thus raised the question of the potential legality of that type of activity as a countermeasure to an unlawful use of force or intervention against a third State.

In addition to these various provisions of the Vienna Convention and judgments of the International Court, sentiments expressed by certain members of the International Law Commission in the course of that body's work on State responsibility reveal an underlying sympathy for the notion that every party to a multilateral treaty enjoys certain remedial rights when that treaty is breached in a serious way. The comments of Sir Ian Sinclair are particularly noteworthy in this respect. While accepting that, when they fall to be performed, obligations under a multilateral treaty are usually owed to only one of the States parties,¹⁷¹ he thought that serious breaches of those obligations might quite legitimately be perceived as impairing the interests of all of the parties, since they threaten the legal order which that treaty creates. He recognized that a strong argument might, therefore, be made that each party should have a right to react to serious breaches of a multilateral treaty by requiring the wrongdoer to put an end to its unlawful conduct and taking countermeasures against it to compel it to do so; but, whatever the case, only the State whose first-level rights were infringed by the breach should be entitled to claim pecuniary reparation from the wrongdoing State or guarantees against the repetition of its unlawful conduct.¹⁷² A similar suggestion was also made by Christian Tomuschat.¹⁷³

In conclusion, some recognition has been accorded to the argument that each party to a multilateral treaty should enjoy the ability to take action by way of solidarity *lato sensu* in the event of its breach, at least where the breach is a serious one, posing a grave threat to the treaty regime. Article 60(2) (b) of the Vienna Convention does not confer on every party the most drastic and fundamental remedial right of all—that of unilaterally putting an end to its treaty relations with the wrongdoing State. Nevertheless, there is a significant body of evidence that each party is vested with certain other, less extreme, remedial rights, including the right to take countermeasures against the wrongdoer.

A note of caution should be added to this conclusion. The notion of a 'serious breach' of treaty has here been treated as a univocal concept: that

¹⁷¹ *Yearbook of the International Law Commission*, 1985, vol. 1, p. 89.

¹⁷² *Ibid.* 1984, vol. 1, p. 303. Sinclair seems to have treated this putative right as being derivable from Riphagen's suggested draft Article 5(d)(iii). That provision related to treaties which establish and protect collective interests which are shared by all of the parties. Sinclair suggested that the application of that provision might not only depend on the nature of the treaty in question, but also, and quite independently, on the nature of the breach; for a breach of a quite normal provision might be so serious as to impair the collective interest of the parties in the maintenance of the treaty regime and so bring that treaty within Riphagen's suggested provision. There is, however, no room for this argument in the corresponding provision adopted by the International Law Commission, since draft Article 5(2)(f) requires some express stipulation in the treaty that it is aimed at securing a collective interest: see text at n. 14 above and accompanying note.

¹⁷³ *Ibid.* 1985, vol. 1, at p. 126. Tomuschat preferred that such action be taken collectively 'within the framework of the organized international community'—probably, through the UN—, individual action being permitted only 'in the last resort': *ibid.*, p. 127; and see text at nn. 264–5 below.

A notion somewhat comparable to Sinclair's appears in McCaffrey's discussion of human rights obligations: *ibid.*, p. 97. See also Reuter, *op. cit.* above (n. 38), at para. 283; and Simma, *loc. cit.* above (n. 21), at p. 286.

is, the quality which a breach must possess in order to give rise to the right conferred by Article 60 (2) (a) (i) of the Vienna Convention is the same as that which it must have to vest the rights arising under the rule described in the *Nicaragua* case. Although the two notions of 'serious breach' are indeed very similar, some doubt exists as to whether they are in all respects the same. While a breach which defeats the object and purpose of a treaty must actually thwart, or at least seriously menace, the attainment of that end, a 'material breach' of a multilateral treaty, as defined by Article 60 (3) (b) of the Vienna Convention, arguably does not need to do this. According to that article, a 'material breach' consists in 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. Interpreted literally, this does not require that the breach actually has the effect of frustrating the achievement of that aim; for even an essential provision can be breached in a trivial way, it has been said.¹⁷⁴ At the same time, the International Court, in its judgment in the *Namibia* case,¹⁷⁵ formulated the notion of 'material breach' described in Article 60 (3) (b) in such a way as to indicate that what is required is 'a violation of obligations which *destroys* the very object and purpose' of the treaty in question.¹⁷⁶ The Court thus pointed to the unified concept of 'serious breach' which has been assumed here.¹⁷⁷

(c) *International Crimes*

It is, however, as factors influencing the development and elaboration of the concept of an international crime that notions of solidarity are currently playing their most prominent role.¹⁷⁸ As part of its study of the content, forms and degrees of State responsibility, the International Law Commission has begun to tackle the awkward question of what remedial rights should arise on the commission of such a wrong, and, while it has not yet completed its task, the importance which the Commission places on 'the future development of international solidarity' is already evident.¹⁷⁹ The

¹⁷⁴ Simma, loc. cit. above (n. 68), at pp. 60-1. Cf. Reuter, op. cit. above (n. 38), at paras. 283 and 284.

¹⁷⁵ Loc. cit. above (n. 41).

¹⁷⁶ Para. 95 (emphasis added). See also paras. 99 and 102 ('fundamental breach'); para. 100 ('gross violation'); and para. 101 ('serious breach'); though see para. 104 ('failure . . . to comply with the obligation to submit to supervision and to render reports, an essential part of the Mandate').

¹⁷⁷ Both the concept of 'material breach' and the notion of activity which defeats the object and purpose of a treaty require further study and elaboration. This important task has attracted little attention in the doctrine, even in the many studies which have been made of the obligation imposed by Article 18 of the Vienna Convention. It is too large a job to tackle here, though.

¹⁷⁸ On the idea of international criminality, see the Commentary of the International Law Commission to Article 19 of Part 1 of its Draft Articles on State Responsibility: *Yearbook of the International Law Commission*, 1976, vol. 2, part 2, at pp. 95-122. See also: Dupuy, loc. cit. above (nn. 12, 37 and 62); and Simma, loc. cit. above (n. 21).

¹⁷⁹ Riphagen, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 156, summing up the Commission's debate on his Sixth Report.

Commission thus considered that an international crime should cause at least certain remedial rights to vest in every State of the world—a position which is reflected in draft Article 5(3) of Part 2 of the Commission's Draft Articles on State Responsibility, as provisionally adopted by that body at its 1985 session.¹⁸⁰ The developing practice relating to international crimes also reveals the store which at least certain States place on the possibility of action by way of solidarity.¹⁸¹

In reaching its decision that all States should be deemed 'injured' by an international crime, the Commission was moved, at least in part, by the importance of facilitating action by way of solidarity *stricto sensu*. Rules whose breach constitutes an international crime are considered to possess many of the characteristics enjoyed by normal rules of international law. In any given situation, the right to their performance is vested in one State only, or else in a small group of States, and, if a breach occurs, then that State or circle of States is vested with the whole range of remedial rights against the wrongdoer which is recognized by international law.¹⁸² In the case of international crimes, however, the Commission felt that it was necessary to go further and recognize that, beyond this first level of rights, there exists a second level, vested in all the other States of the international community, with the purpose, at least in part, of enabling them to help the State whose first-level rights are infringed by a crime to enforce its rights.¹⁸³ All States thus have a right to require the wrongdoing State to perform both its primary and its secondary obligations to the State 'directly affected' by the crime.¹⁸⁴ They also enjoy the right to take counter-measures against the wrongdoing State in order to compel it to perform those

¹⁸⁰ For draft Article 5(3) and the Commission's Commentary thereon, see *loc. cit.* above (n. 9).

¹⁸¹ Dupuy, *loc. cit.* above (n. 37). See especially the declaration of EEC Foreign Ministers, adopted at Luxembourg on 22 April 1980, announcing the measures which the Member States would take against Iran in response to the continuing detention of US diplomatic personnel in Tehran: Rousseau, *Revue générale de droit international public*, 84 (1980), p. 876 at pp. 881–2. Responding to the request of the US to associate themselves with the measures which it had taken, the declaration announces 'la solidarité des Neuf avec le gouvernement et le peuple des États-Unis', noting that Iran's disregard of its international obligations 'devrait constituer un sujet de préoccupation pour toute la communauté internationale', and consequently appealing to other States to associate themselves with the measures which 'the Nine' were going to take. On whether Iran's wrong in fact fell within the International Law Commission's definition of an international crime, see Simma, *loc. cit.* above (n. 21), at n. 15.

¹⁸² See Riphagen's proposed draft Article 14(1) together with para. 2 of his accompanying Commentary: Riphagen's Sixth Report, pp. 13–14. See also Report of the International Law Commission to the General Assembly on the Work of its Thirty-Sixth Session, *Yearbook of the International Law Commission*, 1984, vol. 2, part 2, p. 103; Simma, *loc. cit.* above (n. 21), at p. 305; and Graefrath, *loc. cit.* above (n. 2), at pp. 57 and 58. However, there are certain crimes which are 'victimless': see text at nn. 192–3 below. In these cases, solidarity *stricto sensu* clearly has no role to play.

¹⁸³ In para. 9 of the Commentary to his proposed draft Article 14, Riphagen remarked that, in the case of an international crime, 'a response comparable to a measure of collective self-defence may be allowed': Riphagen's Sixth Report, p. 14. Cf. para. 210 of the International Court's judgment in the *Nicaragua* case, discussed at n. 37 and nn. 164–70 above. The unlawful acts which the USA alleged Nicaragua had committed and to which it claimed to be responding probably come within the International Law Commission's definition of an international crime in Article 19(2) of Part 1 of its Draft Articles on State Responsibility, especially in the light of draft Article 19(3) (a).

¹⁸⁴ Riphagen's Sixth Report, p. 14 n. 44.

obligations.¹⁸⁵ However, these are probably the only remedial rights which they do possess; and, in particular, they are not entitled to demand pecuniary reparation for any losses which they might have suffered on account of the crime.¹⁸⁶ Their remedial rights are thus different in scope from those enjoyed by the State whose first-level rights are infringed by the commission of a crime, as many members of the International Law Commission,¹⁸⁷ together with many speakers in the UN General Assembly's Sixth Committee,¹⁸⁸ have taken pains to point out.

Since notions of solidarity *stricto sensu* have played at least some role in the International Law Commission's decision to recognize a second level of rights in respect of international crimes, it is also not surprising to find some awareness among the members of the Commission that consideration needs to be given to the question of whether, and how far, the exercise of these rights should be dependent on the invitation of the State whose first-level rights have been infringed by an international crime.¹⁸⁹

As has already been seen, it has often been said to be important that States other than the holder of a first-level right should be entitled to react to an international wrong, especially one which is serious in nature. However, this has usually been because of the perceived importance of enabling States to uphold rules which are the subject of breaches and to protect them against erosion. In contrast, much less stress has been placed on making it possible for States to assist each other in the enforcement of their rights. That the International Law Commission was moved by this consideration in the case of international crimes is thus worthy of some note. At least part of the explanation for this difference in approach is the fact that, in the case of a crime, the wrong will probably be so drastic in its effects as to impair the ability of the victim to take effective countermeasures against the

¹⁸⁵ On the right of these States to take action to support a State which is the victim of an international crime, see Jagota, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 155. See also the comments of Jagota to the Sixth Committee of the UN General Assembly, made in his capacity as Chairman of the International Law Commission: A/C.6/40/SR.23, p. 7. China has spoken in terms of a right—and a superadded duty—to provide 'political and moral assistance' to the victim State: A/C.6/40/SR.30, p. 19.

¹⁸⁶ Riphagen, loc. cit. above (n. 184); and see the text at nn. 28–30 above for discussion of Riphagen's comments.

¹⁸⁷ Report of the International Law Commission to the General Assembly on the Work of its Thirty-Sixth Session, *Yearbook of the International Law Commission*, 1984, vol. 2, part 2, p. 103; Sinclair, *ibid.*, vol. 1, p. 304; Quentin-Baxter, *ibid.*, p. 305; McCaffrey, *ibid.* 1985, vol. 1, p. 97; Calero Rodrigues, *ibid.*, p. 100; Huang, *ibid.*, pp. 108 and 109; Ogiso, *ibid.*, p. 122; Mahiou, *ibid.*, p. 128; Razafindralambo, *ibid.*, p. 135; Akinjide, *ibid.*, p. 139; Yankov, *ibid.*, p. 145; Malek, *ibid.*, p. 147; Arangio-Ruiz, *ibid.*, p. 149; Jagota, *ibid.*, pp. 154 and 155; and Riphagen, *ibid.*, p. 157.

¹⁸⁸ Italy, A/C.6/39/SR.39, p. 12; the USA, A/C.6/39/SR.42, p. 4; Czechoslovakia, A/C.6/39/SR.43, p. 6, and A/C.6/40/SR.29, p. 5; Romania A/C.6/39/SR.43, p. 14; the GDR, A/C.6/40/SR.25, p. 5; and Ireland, A/C.6/40/SR.28, p. 8; though cf. the FRG, A/C.6/39/SR.36, p. 5, and A/C.6/40/SR.24, p. 4.

¹⁸⁹ Ogiso thus asked whether other States might still take countermeasures against the wrongdoer when the 'directly affected' State has chosen to waive the breach or to settle: *Yearbook of the International Law Commission*, 1985, vol. 1, p. 123; and see Simma, loc. cit. above (n. 21), at p. 313. On the answer to this question, see text at nn. 202–6 below.

wrongdoer.¹⁹⁰ Moreover, a State which is willing to commit such a grievous wrong is not likely to be coerced into ending its breach and making reparation by the efforts of the victim State alone.¹⁹¹ The assistance of other States may thus be vital if the victim of an international crime is to have any reasonable chance of enforcing its rights.

Although notions of solidarity *stricto sensu* played an important role in the deliberations of the International Law Commission, they cannot, on their own, offer a complete explanation of draft Article 5(3). Certain of the crimes listed in Article 19(3) of Part I of the Commission's Draft Articles on State Responsibility—for example, serious breaches on a widespread scale of the prohibitions on genocide and *apartheid*¹⁹²—are, in many cases, 'victimless', there being no one particular State vested with a first-level right that the crime not occur.¹⁹³ The notion of helping victim States to enforce their rights makes no sense in regard to this category of crimes. Moreover, even in the case of crimes which do have a victim, factors over and above the importance of enabling those States to enforce their rights played a central role in the Commission's deliberations.

As defined by draft Article 19(2), the rules whose breach constitutes an international crime are the fundamental norms of the international community.¹⁹⁴ It follows that their violation cannot be tolerated, since, by weakening the rule, infractions threaten the basic structure of international society itself. However, not only will there often be no victim State which can be relied upon to enforce the rule, but also, even where there is such a State, its resources will generally prove inadequate to ensure the accomplishment of this important end. In view of 'the "community interest" in a powerful reaction to "international crimes"',¹⁹⁵ it has consequently been thought necessary to provide for 'the mobilization of the "international community as a whole"' in order to ensure that breaches of these fundamental rules are suppressed.¹⁹⁶ All States are accordingly to be recognized as vested with the rights necessary to secure the enforcement of these

¹⁹⁰ All the subparagraphs of draft Article 19(3), which lists examples of international crimes, begin with the words 'a serious breach'. See also Simma, loc. cit. above (n. 21), at pp. 292 and 294.

¹⁹¹ Riphagen's analogy between the second-level rights which vest in the case of an international crime and the right of collective self-defence is relevant in this regard: loc. cit. above (n. 183); and see Riphagen's Fourth Report, pp. 21–2.

¹⁹² Draft Article 19(3)(c). At least certain breaches of draft Article 19(3)(b) may also fall within this category.

¹⁹³ McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 97; Mahiou, *ibid.*, p. 128; and Riphagen, *ibid.*, p. 157. See also Simma, loc. cit. above (n. 21), at pp. 310 and 313.

¹⁹⁴ See, for example, Romania, A/C.6/SR.1405, p. 46. Cf. the judgment of the International Court in the *Barcelona Traction* case at paras. 33–4; and its decision in the case of *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports, 1980, p. 3 at para. 92.

¹⁹⁵ Simma, loc. cit. above (n. 21), at p. 306.

¹⁹⁶ Roukounas, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 140. See also Graefrath, loc. cit. above (n. 2), at p. 29. Several 'Western' States have disputed this necessity: Australia, A/C.6/39/SR.42, p. 17; the FRG, A/C.6/40/SR.24, p. 4; France, A/C.6/SR.1188, p. 66, and A/C.6/40/SR.34, p. 12; perhaps Ireland, A/C.6/40/SR.28, p. 8; Kuwait, A/C.6/40/SR.34, p. 19; and the USA, A/C.6/40/SR.29, p. 8.

rules:¹⁹⁷ namely, the right to claim that their violation cease,¹⁹⁸ and the right to take countermeasures, if necessary, to secure that goal.¹⁹⁹ However, they probably receive no other rights than these,²⁰⁰ and, in particular, they enjoy no right to demand pecuniary reparation from the wrongdoing State in respect of any loss which they might have suffered on account of the crime.²⁰¹

These rights are in no way dependent on, or auxiliary to, the rights of States victims of international crimes. They are accorded to each State in view of its own, individual interest as a member of the international community in upholding the rules which are fundamental to the good order of that society.²⁰² They should, therefore, not be affected if the victim State does not react to the crime, failing to avail itself of the remedial rights which it possesses; nor should they be impaired if that State decides to go further and 'waive' the crime. In either case, the fundamental interest of the community of States in the suppression of the crime still remains.²⁰³

It is, therefore, to make possible 'the reaction of solidarity',²⁰⁴ in both the narrower and the broader senses of that term, that Article 5(3) of the International Law Commission's draft recognizes every State to be 'injured' by the commission of an international crime. In the case of those crimes which have 'victims', the right to take both types of action will arise, and some

¹⁹⁷ Simma, loc. cit. above (n. 21), at pp. 306 and 310. Rights to the performance of these obligations cannot be vested in international society as a whole, since no such juridical person currently exists in international law: Barberis, *Los Sujetos del Derecho Internacional Actual* (1984), pp. 32-3; Dupuy, loc. cit. above (n. 37), at p. 544; though cf. Ago, quoted in Simma, loc. cit. above (n. 21), at n. 107. Nor is there any juridical person which is vested with the responsibility of acting on behalf of that community and protecting its interests: cf. Dupuy, loc. cit. above (n. 62), at p. 541. As for the notion of vesting rights in relation to international crimes in an international organization, cf. text at nn. 250-3 below.

¹⁹⁸ Riphagen's Fourth Report, p. 11.

¹⁹⁹ Riphagen's Fourth Report, p. 12. See also McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, pp. 97 and 99; and USSR, A/C.6/39/SR.42, p. 2.

²⁰⁰ The GDR has suggested that they might also have a right to receive guarantees against a recurrence of the breach: A/C.6/40/SR.25, pp. 5-6. Cf. Graefrath's opinion on this matter, discussed in n. 52 above.

²⁰¹ See text at nn. 28-30 and 49-50 above.

²⁰² Riphagen, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 157.

²⁰³ Cf. Ogiso, loc. cit. above (n. 189). A State whose first-level rights are injured by an international crime should obviously be able to choose not to require the wrongdoing State to pay pecuniary reparation to it. However, it has been doubted whether that State, or any other State, should be able to waive compliance with the primary obligation which is imposed by a rule whose breach constitutes an international crime. Both the fundamental interest of the international community in the suppression of such wrongs and the fact that the rules which define them possess the nature of *jus cogens* indicate that no State can validly consent to another State's departure from those rules: Brazil, A/C.6/39/SR.41, p. 8; Graefrath, loc. cit. above (n. 2), at pp. 57, 71 and 72; Simma, loc. cit. above (n. 21), at p. 285; and cf. Article 29(2) of Part I of the International Law Commission's Draft Articles on State Responsibility. Brazil has even suggested that States should be duty-bound to require wrongdoers to put an end to their criminal conduct: loc. cit.

²⁰⁴ The phrase is Malek's: *Yearbook of the International Law Commission*, 1985, vol. 1, p. 147; and see Riphagen, *ibid.*, p. 156.

care needs to be exercised in analysing the rights which will then exist in order to avoid illegitimately extending their scope. Acting to uphold the fundamental rules of international society, every State is entitled to require the wrongdoing State to put an end to its criminal conduct and can subject it to countermeasures, if necessary, to compel it to do so. These rights can be exercised without any need for a prior request from the State which is the victim of the crime—even, indeed, if that State takes the attitude that no crime has been committed.²⁰⁵ On the other hand, once the wrongdoing State has ceased to perform those acts which put it in breach of its primary obligations, no further action by way of solidarity *lato sensu* can be justified.²⁰⁶ At the same time, the victim may still need help to enforce its remedial rights against the wrongdoing State, and, to the extent that such measures are justifiable, other States remain entitled to take action by way of solidarity *stricto sensu*. They thus enjoy the right to require the wrongdoing State to perform its remedial obligations to the victim State and are entitled to take countermeasures against it to compel it to do so. These rights, however, may only be exercised in so far as the victim State requests such assistance.

While the International Law Commission thought it necessary to recognize that every State enjoys remedial rights in respect of an international crime, there was, at the same time, considerable appreciation of the dangers presented by facilitating the exercise of solidarity on such a wide scale.²⁰⁷ Concern about much the same risks explains the dearth of evidence in favour of the lawfulness of action by way of solidarity in respect of non-serious breaches of multilateral treaties. These hazards are also worth noting because they will beset serious breaches of multilateral treaties, if, as has been tentatively suggested, every party is vested with certain remedial rights against a State which commits such a wrong.

If each State were left to reach its own decision on whether an international crime has been committed and its remedial rights have thus vested, there would be the very real prospect that States might take action without lawful cause. To decide that it has been 'injured' in the sense of draft Article 5(3), not only would a State have to determine whether another State has committed a breach of its international obligations, but it would also have to judge whether those obligations are ones whose breach is an international crime—a particularly difficult and controversial question, involving a considerable margin of appreciation.²⁰⁸ There is a clear risk that

²⁰⁵ However, the attitude of the victim State may still have some relevance at this stage, if action by way of solidarity *lato sensu* is to be subjected to institutional control: see text at n. 267 below.

²⁰⁶ Cf. nn. 52 and 200 above.

²⁰⁷ Rather oddly, less concern has been expressed about the other obligations which the Commission thought are owed *erga omnes*. For example, many members of the Commission wished to limit the scope of draft Article 5(2)(f) (see text at nn. 14–15 above and accompanying notes), but were apparently little concerned about the problems caused by the fact that remedial rights would still vest in every party to a treaty under that provision, even after it had been thus limited.

²⁰⁸ Dupuy, loc. cit. above (n. 12), at p. 484.

States might make mistakes in the exercise of this judgment. To leave each State to determine its own right to respond to an international crime might, therefore, let loose 'a sort of international vigilantism',²⁰⁹ with States being wrongly accused of crimes and subjected to damaging measures without good cause. More worrying still is the prospect of abuse and bad faith, States taking action against each other despite the absence of any legal warrant and invoking their remedial rights in respect of international crimes to cloak their behaviour with a spurious legality.²¹⁰ The logic of international relations creates an all-too-real risk that the rights conferred by draft Article 5(3) will be twisted and shaped to political ends,²¹¹ being used 'to justify power politics'.²¹²

Admittedly, the risk that remedial rights might be invoked erroneously or in bad faith besets ordinary international wrongs as much as international crimes. There too, in view of the basically auto-interpretative nature of international legal relations,²¹³ States are judges of their own right to bring claims and take countermeasures. However, in the case of crimes, the problems which flow from this are so much greater. The chances that a State will be subjected to damaging measures without any legal justification increase as the number of States which can react to an international wrong swells, especially since it is then more likely that that number will include a State with which it has bad relations. Moreover, as the number of States with remedial rights grows, the odds also increase that there will be included among them a State which can take more damaging and effective measures against the State which is accused of a wrong, as do the chances that those States will act together and subject the latter to overwhelming coercion. To increase the number of States entitled to take countermeasures in respect of a wrong might create a more effective weapon for its repression, but it is also to create a more effective means of causing wrong as long as there are no proper controls on its use.

Furthermore, if every State were given the right to take countermeasures to suppress an international crime but were left to judge for itself when this right vests, the stability of the international legal order would be threatened—and that by the very means meant to ensure its protection. The right to take countermeasures consists in the grant of a dispensation from compliance with the obligations which are normally incumbent on a State. To confer on a State the right to take countermeasures is, therefore, to give it an excuse for not performing its legal obligations;²¹⁴ and, in so far as that

²⁰⁹ Simma, loc. cit. above (n. 21), at pp. 299 and 314.

²¹⁰ Akehurst, loc. cit. above (n. 16), at p. 15; Leben, loc. cit. above (n. 18), at p. 21; Dupuy, loc. cit. above (n. 37), at p. 546.

²¹¹ Leben, loc. cit. above (n. 18), at p. 39; Dupuy, loc. cit. above (n. 37), at p. 542.

²¹² Graefrath, loc. cit. above (n. 2), at p. 68; and see *ibid.*, p. 53.

²¹³ Cheng, loc. cit. above (n. 48), at pp. 521–3.

²¹⁴ Article 30 of Part I of the Commission's Draft Articles on State Responsibility, which makes countermeasures lawful, thus falls within Chapter V, which is entitled 'Circumstances Precluding Wrongfulness'.

State remains the judge of its own right to take such measures, it is thus free to exempt itself from its duties. Other States may review the exercise of this judgment, determining whether that State's rights have been infringed by the commission of a wrong and whether the preconditions to a lawful exercise of the right to take countermeasures have been fulfilled; but, in the case of international crimes, this assessment will be all the more difficult to make in so far as it remains unclear precisely which wrongs are international crimes.²¹⁵ To give every State the right to take countermeasures in response to an international crime while leaving it to decide for itself when that right has vested is thus, in Dupuy's words, to provide a way for the maximum number of States possible to excuse their unlawful acts by appealing to 'le "blanc-seing" d'ordre public', which, in turn, 'risque d'ouvrir une brèche béante dans tout le droit de la responsabilité sinon même au-delà, en ébranlant la notion même d'illicite'.²¹⁶ In the UN General Assembly's Sixth Committee, several States expressed their fear of the anarchy which might ensue.²¹⁷

In the light of these considerations, the International Law Commission's former Special Rapporteur on State responsibility thought that States would not be prepared to accept the notion that every State is vested with remedial rights in respect of an international crime unless the exercise of those rights were subjected to the condition precedent of an independent and authoritative determination by some international organ that a crime has in fact been committed.²¹⁸ Similar factors caused some measure of concern to be expressed at the Vienna Conference on the Law of Treaties about the proposal to vest every party with the right to put an end to its relations under a multilateral treaty with a State which breaches it in a material fashion—a right now embodied in Article 60(2)(a) (i) of the Vienna Convention.²¹⁹ However, in that case, it was not considered necessary to subject that right to some form of institutional control, the risk of its abuse being obviated by making its exercise dependent upon the unanimous agreement of all the parties to the treaty.²²⁰

²¹⁵ Dupuy thus talks of the problem caused by the 'contours indécis d'une légitimité trop malléable': loc. cit. above (n. 37), at p. 548.

²¹⁶ Ibid., at p. 546.

²¹⁷ The FRG, A/C.6/39/SR.36, p. 4; and the USA, A/C.6/39/SR.42, p. 4. Cf. Leben's comments on the 'ferment d'anarchie' which countermeasures create: loc. cit. above (n. 18), at p. 76; and see ibid., pp. 10 and 19.

²¹⁸ Riphagen's Fourth Report, p. 12. See also Ushakov, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 119; the FRG, A/C.6/39/SR.36, p. 4; Italy, A/C.6/39/SR.40, p. 12; Spain, A/C.6/39/SR.40, p. 10; and the USA, A/C.6/39/SR.42, p. 4; and cf. Trinidad and Tobago, A/C.6/40/SR.32, p. 4, on the similar problem created by draft Art. 5(2)(f). See also Dupuy, loc. cit. above (n. 12), at p. 484.

Riphagen, together with several other members of the International Law Commission, considered that certain exceptions to this precondition might have to be made: see text at nn. 264–7 below.

²¹⁹ The UK thus moved an amendment to subject the exercise of this right to the procedural controls in Section 4 of Part V of the Convention, which include compulsory conciliation: A/CONF. 39/L. 29, reproduced in *United Nations Conference on the Law of Treaties, Official Records*, vol. 3, at p. 269.

²²⁰ Akehurst, loc. cit. above (n. 16), at p. 16. Simma, however, does not share this optimism: loc.

If an independent and authoritative finding by some international body that a crime has been committed were made an indispensable accompaniment to the exercise of remedial rights in respect of an international crime, then several other problems flowing from draft Article 5(3) would also be resolved.

It has already been noted how the uncertainty which surrounds the question of which rules of international law create international crimes, together with the ever-present problems of ascertaining the facts surrounding international incidents, would make it possible for States to abuse their rights to react to international crimes if they were not subjected to some form of institutional control. At the same time, these very same factors make it unlikely that it will ever be obvious that a State is in fact guilty of a crime. Yet, unless it is incontestably clear that a crime has been committed, it will be difficult to mobilize the powerful reaction of solidarity which such grave wrongs are thought to merit.²²¹ If States were left to reach their own conclusions as to whether a crime had been committed, there would often be uncertainty and indecision, compounded by the natural disinclination of one State to brand another a 'criminal', resulting in a reluctance to take any action at all against the alleged wrongdoer. Moreover, even if some States were convinced that a crime had been committed, their judgment would probably be disputed. One group of States might consequently challenge the legitimacy of the action taken by another group to repress a crime, deeming it to have no lawful basis. They might then provide assistance to the State which had committed the crime, enabling it to withstand the deprivations inflicted on it, and might even join it in taking 'counter-countermeasures' against its persecutors. The effectiveness of any international reaction to an international crime which did materialize would thus be undermined and frustrated.²²² In contrast, an authoritative finding by an independent body that the alleged wrongdoer has in truth committed a crime would tend to make it easier to mobilize action against that State and to deprive it of succour or support.

cit. above (n. 68), at pp. 66–7.

The recognition in Articles 53 and 64 of the Vienna Convention of rules of *jus cogens* created similar fears on the part of many States. These fears were met by providing in Article 66(a) for the possibility of recourse to the International Court of Justice as a precondition for a treaty being considered void under those two provisions: see also text at nn. 256–8 below and commentary in n. 257.

²²¹ Leben, loc. cit. above (n. 18).

²²² Ibid. Thus, the measures taken by the UK and the Member States of the EEC against Argentina in response to its occupation of the Falklands/Malvinas were seen as illegitimate economic aggression by several Latin American States. These States took no measures of their own in response, although they did supply arms to Argentina to help it circumvent the embargo imposed on it. See *ibid.*, p. 37; and Rousseau, *Revue générale de droit international public*, 86 (1982), p. 724 at p. 749. Similarly, the measures taken against Poland after a 'state of emergency' was declared in that country in December 1981 were qualified by the USSR as an unlawful intervention in Poland's internal affairs: Leben, loc. cit. above (n. 18), at pp. 37–8; and see Graefrath, loc. cit. above (n. 2), at p. 68.

A further potential problem posed by vesting every State with remedial rights in respect of an international crime is the difficult position in which this would place a State when the criminality of its conduct is in question. If each State were left to itself to interpret a rule which creates an international crime, being entitled to exact its due performance from the State bound thereby, then the latter might find itself 'caught between a number of possible different expressions of view' as to what it must do to fulfil its primary obligation under that rule.²²³ Likewise, if it were to fail to comply with that obligation and so commit a crime, that State might find itself subjected to varying demands as to what it should do to put an end to its criminal activity and resume compliance with the law.²²⁴ The difficult position of that State, asked, and even coerced, to do different things, can be readily appreciated.²²⁵

'Competing diplomatic claims', by complicating the position of the State at which they are directed, also make international disputes that much more difficult to settle, engendering 'an atmosphere of confusion and insecurity in international . . . relations'.²²⁶ In so far as the claims differ, it becomes more difficult to reach a settlement, the wrongdoing State having to weigh and accommodate divers and dissimilar points of view. To reach agreement with one claimant or set of claimants may well not be enough to put an end to the dispute, since others might not be satisfied by the accommodation reached and so continue to press their demands,²²⁷ even backing them up with countermeasures.²²⁸ Even if all of the claimants are in accord in the demands which they make, nevertheless, if there is still a possibility that other States might be led to make differing or supplementary claims through dissatisfaction with any settlement agreed upon between those States and the wrongdoer, then it will remain difficult for them to achieve an accommodation, since any settlement they make might not put an end to the matter.²²⁹

²²³ See the comments of the International Court in the *South West Africa* cases of 1966, at paras. 34 and 38.

²²⁴ This problem would be greater still if every State enjoyed a right to require guarantees from the wrongdoer against repetition of its criminal conduct.

²²⁵ However, the GDR urged that the International Law Commission's Draft Articles on State Responsibility should proceed from the position of the injured State and not be over solicitous for the protection of wrongdoing States against the consequences of their unlawful conduct: A/C.6/39/SR.45, p. 4.

²²⁶ *Barcelona Traction* case, para. 96. The International Court recognized that this problem would become worse the more States there were which held a right to require the performance of an obligation: paras. 96 and 98.

²²⁷ *Ibid.*, para. 87.

²²⁸ Ogiso, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 123.

²²⁹ *Barcelona Traction* case, para. 97. The Court was there dealing with a slightly different hypothetical situation: not the existence of several right-holders, each able to press their claims independently and simultaneously, but rather the idea of one or more right-holders which were able to press their claims only if and when another right-holder has failed fully to enforce the law against the obligated State. This second situation raises several issues of its own; but common to the two is the problem of the shadow which is cast over negotiations between the obligated State and one right-holder by the possibility that another right-holder might later press a claim, being dissatisfied with the first right-holder's

Furthermore, competing and conflicting claims reduce the prospect that well-founded and legitimate demands will be met. By claiming either more or less than that to which they are entitled, one group of States may easily 'undermine the authority' and 'frustrate the action' of another group which is seeking full and proper respect for its rights.²³⁰

These problems probably cannot be eradicated as long as every State is recognized to possess remedial rights which it may exercise independently of other States and irrespective of the decisions which they reach on how to exercise the rights which they possess.²³¹ However, by stipulating that these rights cannot be exercised unless and until an independent international body has found that a crime has been committed, these problems can be alleviated; for, in making such a determination, that body will have to interpret and apply the law, thus establishing authoritatively what the alleged wrongdoing State must do to comply with its primary obligations and so diminishing the chances that that State will be subjected to competing and conflicting claims which embody different interpretations of its obligations.²³²

However, an independent and authoritative determination that a crime has been committed cannot solve all of the problems attendant upon vesting every State with the right to take action in respect of such a wrong. Accordingly, many members of the International Law Commission are convinced of the need to subject the right of States to respond to international crimes to further, additional institutional controls.

Even if the exercise of remedial rights were subjected to a prior determination by an international body that a crime had been committed, if States were nevertheless left free to act independently of each other when taking action to suppress that wrong, then the wrongdoing State might be occasioned an excessive and unjustifiable amount of damage, over and above that required to coerce it to put an end to its criminal conduct and observe its remedial obligations.²³³ The bargaining position of that State might also

enforcement of the primary obligation against the obligated State. Cf. also, in this respect, the avowed reluctance of Bulgaria to settle with Israel the pecuniary reparation due to the latter until the nature of the USA's claim became clear: *Aerial Incident of 27 July 1955, ICJ Pleadings*, p. 69.

²³⁰ *South West Africa* cases of 1966, para. 38. It loomed large in the Court's reasoning in those cases that, had the supervision of the performance of the Mandate been simultaneously vested in each of the Members of the League of Nations, then the oversight exercised by the Council of the League would have been seriously impaired.

²³¹ For this reason, these problems are not likely to afflict rights accorded to facilitate action by way of solidarity *stricto sensu*. See text preceding n. 35 and at nn. 36–7 above.

²³² See also text at n. 243 and n. 258 below.

²³³ The notion of punishment plays no part in the law of international responsibility, and international crimes are no exception in this regard: Riphagen, summing up the debate in the International Law Commission, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 156. See also Graefrath, loc. cit. above (n. 2), at pp. 60, 63, 66, 101, 102 and 103; and Zoller, op cit. above (n. 17), at pp. 117 and 135. This marks a departure from the attitude adopted by Ago when he was the Commission's Special Rapporteur on State Responsibility during the 1970s. See, in particular, Report of the International Law Commission on the Work of its Twenty-Fifth Session, *Yearbook of the International Law Commission*, 1973, vol. 2, pp. 174–5, para. 5 of the Commentary to draft Article 1.

be unduly weakened, rendering it unable to resist any illegitimate or excessive demands for reparation which might be made of it. At the same time, States would have a ready excuse for not performing their obligations to the wrongdoing State, being able to justify their violation as a lawful countermeasure, despite the fact that the aggregate international reaction might make further measures unnecessary and superfluous.²³⁴

In theory, a wrongdoing State is protected against such an excessive reaction by the requirement that, to be lawful, the countermeasures taken against it should not inflict upon it harm which is manifestly disproportional to the seriousness of its wrongful act.²³⁵ Moreover, if a number of States take action against a single wrongdoer, this test should be applied to their countermeasures as a whole, conditioning their legality on the amount of cumulative damage which they cause, so that the protection afforded by the rule is not circumvented.²³⁶ Nevertheless, this limitation is likely to prove a poor safeguard against an excessive reaction to international crimes as long as its application is left to the judgment of each individual State and no means exists for making an overall assessment of the effects of the various countermeasures—together with the measures of retorsion²³⁷—which are initiated by different States.²³⁸ This problem is all the greater in so far as the proper interpretation and application of the ‘no-manifest-disproportionality’ test is somewhat unclear,²³⁹ leaving a margin of appreciation which is only increased by its negative formulation.

Conscious of the need to prevent over-reaction to international crimes,²⁴⁰ several members of the International Law Commission have maintained that the exercise by States of their remedial rights should be subjected to some form of control by an international organ, wherein the proper response to an international crime might be determined, organized and

²³⁴ Cf. text at nn. 214–17 above.

²³⁵ See, for example, Riphagen’s proposed draft Article 9(2): Riphagen’s Sixth Report, p. 11.

²³⁶ This follows from the maxim *cessat ratio, cessat lex*. The reason why the law grants States dispensation from complying with their obligations *vis-à-vis* a State which commits a crime is to afford them the means to coerce it to return to legality: see, for example, Riphagen’s Sixth Report, pp. 10–11; Flitan, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 104; Njenga, *ibid.*, p. 124; Roukounas, *ibid.*, p. 141. The proportionality test is designed to legalize wrongdoing and legitimize coercion commensurate with that purpose, but no more. Therefore, to operate the test by applying it to the measures taken by each State, considered singly and independently of the measures of other States, would have the result of legitimizing more coercion than is required for the achievement of the lawful purpose in view.

²³⁷ By dint of the same argument as is adduced in n. 236 above, how much harm may be inflicted on the wrongdoing State by means of reprisals should be assessed in the light of the amount of harm inflicted on it by measures of retorsion.

²³⁸ *Contra*, Zoller, *op. cit.* above (n. 17), at p. 117.

²³⁹ Reuter, *op. cit.* above (n. 38), at para. 281.

²⁴⁰ Huang, *Yearbook of the International Law Commission*, 1985, vol. 1, pp. 107 and 108. Several States have also expressed their concern that great care must be taken to ensure that the reactions of States to international crimes are kept within their proper legal framework: China, A/C.6/40/SR.30, p. 19; the FRG, A/C.6/40/SR.24, p. 4; and Romania, A/C.6/40/SR.30, p. 14. There is an obvious fear that these safeguards might well be eroded if all States might react independently in respect of international crimes: the FRG, A/C.6/39/SR.36, p. 4.

co-ordinated, and the cumulative effect of action taken against the wrongdoing State assessed and controlled.²⁴¹ States would then only be entitled to take those measures which an international body had decided were legitimate and justifiable.²⁴²

Furthermore, the same international organ might also determine how States should exercise their right to require the wrongdoing State to put an end to its criminal activity by fixing the content of the claim which they might make. The problems which might arise from that State being subjected to competing demands from a multiplicity of claimants would also then be avoided.²⁴³

The International Law Commission's former Special Rapporteur on State responsibility contended that reaction to international crimes should be placed under a still greater degree of institutional control than this. Even if States were only to be entitled to make those claims and take those measures which an international organ considered appropriate, nevertheless, in so far as they would remain free to choose whether or not to take that action, it would be likely that the purposes for which their rights were vested would not be served. Although States clearly do perceive themselves as having an interest in upholding the fundamental rules of international law, if the decision whether or not to respond to their infraction were to be left to their unfettered appreciation, it would often be unlikely that any State would act. A State which takes action against a wrongdoing State voluntarily and on its own initiative is likely to inflict much greater damage on its relations with that State and its allies than one which responds with others to the decision of some international organ. Moreover, why should a State decide to shoulder the burden of enforcing a rule for the benefit of other States and little immediate benefit to itself, with all the attendant costs which this might involve, such as the prospect that the wrongdoing State and its allies might subject it to 'counter-countermeasures', if there is no guarantee that other States will act alongside it, sharing and lessening

²⁴¹ Such a body would also be better placed to weigh and assess what the general interest of the international community as a whole requires in respect of reaction to a crime: Dupuy, loc. cit. above (n. 62), at p. 544.

²⁴² Riphagen's Sixth Report, p. 14 (para. 10 of the commentary to his proposed draft Article 14); Sinclair, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 89; Tomuschat, *ibid.*, p. 127; Roukounas, *ibid.*, p. 140; and Riphagen, *ibid.*, p. 157. See also the FRG, A/C.6/39/SR.36, p. 5.

An alternative means of control has been mooted, consisting in limiting the countermeasures available to States other than the victim to less extreme measures, which might be graded in some way according to the seriousness of the crime: the FRG, A/C.6/40/SR.24, pp. 4-5; Ireland, A/C.6/40/SR.28, p. 8; and Romania, A/C.6/40/SR.30, p. 15.

It would probably be impossible to subject the taking of measures by way of retorsion to any such form of legal control. At the same time, channelling international reaction to crimes through some organ or body might help to co-ordinate the exercise of these measures too, and, to that extent, prevent excessive harm being inflicted on wrongdoing States. Certainly, in so far as an international body might control and limit the taking of countermeasures, it should take into account the damage already caused to the wrongdoing State by measures of retorsion: see n. 237 above.

²⁴³ In so far as they are not dispelled by requiring an organ to determine whether a crime has been committed: see text at n. 232 above; and note also text at n. 258 below.

the burden—or at least helping to defray the costs—, and not seek to benefit from its decision to withhold some good or service from the wrongdoer by providing the latter with some alternative source of supply?²⁴⁴ For the same reasons, States are likely to be reluctant to come to the assistance of the victims of international crimes and help them enforce their rights against the wrongdoer, even if the victim is one of their allies.²⁴⁵

Riphagen consequently considered that there must be an international organ, capable not only of specifying the ways in which States are free to exercise their remedial rights, but also empowered to impose obligations upon them to do so.²⁴⁶ States could thus be enjoined to take counter-measures and the powerful collective reaction which crimes are thought to merit might be secured.²⁴⁷ It would also become possible to organize a more efficient and co-ordinated multilateral response to an international crime. States may be relied on to do what they are asked to if they, in turn, can be confident that other States will play the part which is assigned to them. It would also be easier to shut off aid to a wrongdoing State, preventing other States from helping it to withstand the hardships caused by the measures taken against it and so enhancing their effectiveness. Alternatively, if States are not disposed to vest such a large measure of control in some international institution,²⁴⁸ such a body should, nevertheless, be empowered to determine how to lend assistance to those States which are ready and willing to act and to decide how the burden which they have assumed on behalf of the international community should be shared.²⁴⁹

²⁴⁴ Riphagen's Fourth Report, pp. 12–13.

²⁴⁵ The action taken against Argentina by the Member States of the EEC in response to that country's occupation of the Falklands/Malvinas did not remain solid for long: Rousseau, loc. cit. above (n. 222), at pp. 748 and 768. Cf. the difficulties which the USA has encountered at various times in getting its allies to take action against the USSR: Leben, loc. cit. above (n. 18), at pp. 40 and 42–46.

²⁴⁶ Riphagen's Fourth Report, pp. 12 and 13. See also Ago's Second Report on State Responsibility: *Yearbook of the International Law Commission*, 1970, vol. 2, p. 184.

²⁴⁷ Algeria, A/C.6/39/SR.39, pp. 6 and 7, and A/C.6/40/SR.31, p. 10; and Byelorussia, A/C.6/40/SR.24, p. 12. Some members of the International Law Commission have shown themselves sympathetic to imposing an obligation on every State to help the victim of an international crime to exercise and enforce its rights against the wrongdoer: Jagota, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 155; and Ogiso, *ibid.*, p. 121; and see Zoller, op. cit. above (n. 17), pp. 117–18.

²⁴⁸ Dupuy points to the strong opposition which was excited by Article VI of the Convention on *Apartheid*, which, in an evasive and indirect manner, imposes on States parties the obligation to accept and execute decisions of the Security Council on the measures which should be taken to combat *apartheid*. This is all the more striking in so far as, on one possible interpretation, Article VI does not seek to confer any power on the Security Council which it does not already possess under the UN Charter. See Dupuy, loc. cit. above (n. 12), at pp. 466 and 475–6.

²⁴⁹ Thus, Riphagen suggested that, when States do act collectively in response to an international crime, they should come under an obligation to help each other share the attendant burdens: see proposed draft Article 14(2)(c), Riphagen's Sixth Report, p. 13. However, as drafted, this duty is only one of affording mutual assistance in the performance of those measures which are obligatory under proposed draft Article 14(2)(a) and (b), and does not apply to the taking of countermeasures. Riphagen seems to have considered this the minimum degree of solidarity required amongst States in the face of an international crime, and that a greater degree of solidarity might be required in relation to particular crimes: Riphagen's Sixth Report, p. 14 (para. 6 of the Commentary to his proposed draft Article 14).

The idea that States should join to share the cost of action taken by certain of their number, or that the cost of collective action should be borne collectively and not lie where it falls, is already embodied in

There are, therefore, three types, or degrees, of institutional control over the exercise by States of their remedial rights in respect of international crimes which have been proposed to meet the problems which would flow from leaving States to reach their own, independent decisions on how to exert these rights: first, a finding by an independent organ that a crime has been committed should be a necessary precondition to the lawful exercise by States of their rights; secondly, States should only be free to exercise their rights by taking those forms of action which some international organ has decided are legitimate and appropriate; and, thirdly, States should be obligated to take the measures designated by such an organ. It seems to have been supposed, both within the International Law Commission and the Sixth Committee of the UN General Assembly, that, if such control were to be vested in some international body or institution, then it would be exercised by the UN, and, more particularly, by the Security Council.²⁵⁰ The UN is the international organization which is most representative of the international community, and is thus best equipped to measure and assess the threat to those basic societal values which is posed when an international crime is committed, together with the most appropriate response.²⁵¹ Moreover, under Chapters VI and VII of the Charter, it is already possessed of 'un mécanisme intégré de réaction sociale' which, while not designed to repress unlawful conduct nor to deal with all of the types of illegality represented by international crimes,²⁵² might easily be adapted to that purpose.²⁵³

Whilst they are mindful of the problems involved in leaving States to decide for themselves whether and how to exercise their remedial rights, many members of the International Law Commission and many States have expressed grave doubts about the wisdom of subjecting reaction to international crimes to such tight institutional control as this, especially if it is to be exercised by or through the UN.

Some qualms might be felt about conferring upon the Security Council—or, for that matter, the General Assembly—the power to reach an authoritative assessment of whether a crime has been committed and of what amount of harm might legitimately be occasioned to a wrongdoing

Articles 49 and 50 of the UN Charter; but the application of those articles in practice gives little reason for optimism: see Eisemann, in Cot and Pellet (eds.), *La Charte des Nations Unies* (1985), at pp. 755–67. Indeed, States have already expressed unfavourable views on the very limited obligation contained in Riphagen's proposed draft Article 14(2)(c): Australia, A/C.6/39/SR.42, pp. 17–18; Ireland, A/C.6/40/SR.28, p. 8; and Italy, A/C.6/39/SR.40, p. 12.

²⁵⁰ See especially Riphagen's proposed draft Article 14(3) and paras. 10 and 11 of the accompanying commentary: Riphagen's Sixth Report, pp. 13–14. See also Riphagen's Fourth Report, pp. 11–12. For doctrinal treatment of this issue, see Graefrath, loc. cit. above (n. 2), at pp. 68, 74 and 102; Dupuy, loc. cit. above (n. 62), at pp. 548 and 549; and Dupuy, loc. cit. above (n. 12), at pp. 471 and 477–8.

²⁵¹ Dupuy, loc. cit. above (n. 12), at p. 477; but cf. Dupuy, loc. cit. above (n. 37), at p. 544.

²⁵² Roukounas, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 94; the FRG, A/C.6/40/SR.24, p. 4; Romania, A/C.6/39/SR.43, p. 14, and A/C.6/40/SR.30, p. 15; and Zoller, op. cit. above (n. 17), at pp. 104–12.

²⁵³ Dupuy, loc. cit. above (n. 12), at pp. 471–8.

State by means of countermeasures. Although possessed of adequate means to investigate international incidents and discover the facts, the political organs of the UN do not have at their disposal the legal expertise requisite for dealing with the complex juridical questions involved in identifying those wrongs which constitute international crimes. Moreover, as Leben notes, 'd'un point de vue théorique et pratique le Conseil de sécurité ne remplit pas vraiment les conditions idéales pour être un "tiers désintéressé et impartial" dans l'application du droit'.²⁵⁴ Since it is composed of nothing more nor less than States, some likelihood remains that its determinations will be marked by the same bias and the same uneven application of the law which States display when making their own, individual decisions on whether and how to react to international wrongs, even if wilder excesses will tend to be avoided by the mutual restraint which States exercise upon each other when acting in concert.²⁵⁵ However, these problems can probably best be avoided by imposing further, additional institutional controls, rather than fewer. Thus, Riphagen suggested that the International Court of Justice should be accorded the jurisdiction to review both the Security Council's findings on whether a crime has been committed and its determinations of what measure and type of response is appropriate.²⁵⁶ Although this jurisdiction would be exercised *ex post facto*, after the reaction decided upon by the Security Council had been implemented,²⁵⁷ it would nevertheless provide the necessary guarantees against error and bias. At the same time, the Court might in time build up a body of jurisprudence resolving the uncertainties besetting the law of international crimes and so solving many of the problems caused by its obscurity and malleability.²⁵⁸

However, the other problems which are likely to flow from placing the response to international crimes under the control of the UN cannot be solved so easily. Political divisions between States make it probable that, as long as current voting rules were applied, the Security Council would be struck by paralysis and no action at all would be taken in respect of many, if

²⁵⁴ Loc. cit. above (n. 18), at p. 28; and for his similar comment on the General Assembly, see *ibid.*, p. 33.

²⁵⁵ *Ibid.*, pp. 36-9. Concern lest this occur is likely to preclude 'Western' States from consenting to repose control over the reaction to international crimes in the UN General Assembly, whose current voting rules make it prey to the so-called automatic majority wielded by the lesser developed States: Dupuy, loc. cit. above (n. 12), p. 485.

²⁵⁶ Riphagen's Seventh Report, p. 9: proposed draft Article 4(b) of his proposed Part Three.

²⁵⁷ Riphagen's proposed draft Article 3(1) of his proposed Part Three makes it clear that States which allege that a crime has been committed might proceed to take countermeasures without waiting to see whether the alleged wrongdoer disputes their right to do so: *ibid.*, p. 3. States adopting such measures run the risk that they might later be found to have broken the law if the State at which they are aimed chooses to dispute their legality.

The analogy which Riphagen made between his proposed draft Article 4(a) and (b) and Article 66(a) of the Vienna Convention (para. 1 of the commentary to his proposed draft Article 4: *ibid.*, p. 9) is thus not exact, in so far as, under the latter, a State cannot consider a treaty void by virtue of conflict with a rule of *jus cogens*, if another State disputes that there is such a conflict, unless and until the Court has passed judgment in its favour.

²⁵⁸ Cf. Dupuy's insistence that there must be a legislature which defines international crimes in a precise fashion: loc. cit. above (n. 12), pp. 460 and 462.

not most, international crimes, the members failing to agree on whether a crime had been committed, or on whether to take any measures in response to it, or on which measures were feasible and appropriate, or on which State should take which measure, and so on.²⁵⁹ Concomitantly, if agreement were to be reached on some response, the likelihood is that it would be too weak to be effective, given the impossibility of achieving enough support for anything more drastic. The history of the UN and its failure to respond to and repress breaches of international peace and security does not excite confidence.²⁶⁰ Indeed, some commentators suggest that the Security Council would be still more prone to deadlock if it were faced with applying the difficult vocabulary associated with international crimes, since States are likely to be reluctant to brand each other 'criminals'.²⁶¹ Moreover, to entrust the UN with the job of suppressing international crimes might serve to make that organization still weaker than it already is by overburdening it with work²⁶² and further emphasizing its insufficiencies.²⁶³

Consequently, some members of the International Law Commission have suggested that, if the UN were to be given control over the response to international crimes, States must nevertheless retain some residual right to take unilateral action on their own, if only as a last resort when collective action through the UN fails to materialize.²⁶⁴ On the other hand, they have recognized that any right to take such action would be beset by all of the problems which institutional control is designed to avoid and that it would therefore have to be surrounded by adequate safeguards against abuse.²⁶⁵ Nevertheless, even those who favour making the exercise by States of their remedial rights in respect of an international crime dependent upon a prior finding by some international body that a crime has been committed have nonetheless recognized that there are certain crimes whose nature is such as to necessitate an exception to that precondition. First, if there is a victim State, it must be free of such control, entitled to exercise its remedial rights without awaiting an authoritative finding that its first-level rights have been

²⁵⁹ McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, pp. 96 and 99; Koroma, *ibid.*, p. 153; and cf. Al-Qaysi, *ibid.*, p. 143; Israel, A/C.6/39/SR.41, p. 9; Dupuy, *loc. cit.* above (n. 62), at pp. 550, 551 and 554.

²⁶⁰ Malek, *Yearbook of the International Law Commission*, 1985, vol. 1, pp. 147–8; and Leben, *loc. cit.* above (n. 18), at pp. 17–18.

²⁶¹ Dupuy, *loc. cit.* above (n. 12), at p. 478.

²⁶² Romania, A/C.6/39/SR.43, p. 14, and A/C.6/40/SR.30, p. 15.

²⁶³ Dupuy, *loc. cit.* above (n. 12), p. 471.

²⁶⁴ McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, pp. 96–7; Tomuschat, *ibid.*, p. 127; and see Simma, *loc. cit.* above (n. 21), at p. 312. Dupuy believes recent State practice reveals that States are beginning to take it upon themselves to take action where the right to do so is, in principle, vested exclusively in the UN, being prompted by that organization's paralysis, and, in some cases, even anticipating it: *loc. cit.* above (n. 12), at pp. 479–80; and *loc. cit.* above (n. 37), *passim* and esp. at pp. 513, 514 and 515–22; and see de la Rochère, *Annuaire français de droit international*, 29 (1983), p. 749 at p. 764.

²⁶⁵ McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 96; Simma, *loc. cit.* above (n. 21), at p. 313; and cf. Leben, *loc. cit.* above (n. 18), at pp. 31–3.

violated by the perpetration of a crime.²⁶⁶ Secondly, certain crimes might so threaten the victim State that other States must be able to come to its immediate aid in a manner analogous to the exercise of collective self-defence and apply countermeasures against the wrongdoer so as to force it to cease its criminal activity.²⁶⁷

In conclusion, it is unclear what position the International Law Commission will take on the question of the degree of control which international bodies such as the UN and the International Court of Justice should wield over the reaction of States to international crimes.²⁶⁸ This uncertainty seems even to have been felt by the former Special Rapporteur on State Responsibility, Willem Riphagen. For while he intended that the exercise of second-level rights in respect of a crime should be subjected to UN control,²⁶⁹ the provision which he suggested to effect this—draft Article 14(3)—was so unhappily worded that, while some have read it as achieving this result,²⁷⁰ others have considered that it fails to do so, leaving States free to react unilaterally to an international crime and merely recalling that, where a crime does threaten international peace and security—which will not always be the case—the UN may take action by virtue of its powers under the Charter.²⁷¹

IV. CONCLUSION

There is, therefore, substantial pressure to recognize that every party to a multilateral treaty enjoys at least certain remedial rights against a State which violates its obligations under that agreement. One source of this pressure lies in the circumstances which often make it necessary for the

²⁶⁶ The FRG, A/C.6/39/SR.36, p. 5; the GDR, A/C.6/39/SR.45, p. 5, and A/C.6/40/SR.25, p. 5; Ago, *Yearbook of the International Law Commission*, 1970, vol. 2, p. 183; and see Graefrath, loc. cit. above (n. 2), at p. 68.

²⁶⁷ Riphagen's Sixth Report, p. 14 (para. 9 of the commentary to his proposed draft Article 14). Cf. the comments of the FRG, which thought that, in certain cases, the reactions of States which are not the victims of a crime should be free of institutional control: A/C.6/39/SR.36, p. 5.

The International Law Commission suggests that States should always be able to require the wrongdoing State to put an end to its criminal conduct without waiting for any international organ to sanction such a step: loc. cit. above (n. 9), at p. 27 (para. 28 of the Commission's commentary on draft Article 5(3)).

²⁶⁸ McCaffrey, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 97; Balanda, *ibid.*, p. 115; Algeria, A/C.6/39/SR.39, p. 7; the FRG, A/C.6/40/SR.24, p. 4; and Romania, A/C.6/40/SR.30, p. 15. See also Ago's uncertainty on this point when he initially formulated the notion of an international crime: *Yearbook of the International Law Commission*, 1970, vol. 2, at p. 184.

²⁶⁹ Riphagen's Sixth Report, p. 14: paras. 10 and 11 of the commentary to his proposed draft Article 14.

²⁷⁰ Sinclair, *Yearbook of the International Law Commission*, 1985, vol. 1, p. 89; the FRG, A/C.6/39/SR.36, p. 5; probably, the GDR, A/C.6/40/SR.25, pp. 5–6; Romania, A/C.6/40/SR.30, p. 15; the UK, A/C.6/40/SR.32, p. 7; the USA, A/C.6/40/SR.29, p. 8; and the USSR, A/C.6/39/SR.42, p. 2.

²⁷¹ Australia, A/C.6/39/SR.42, p. 17; Trinidad and Tobago, A/C.6/40/SR.32, p. 4; and note that Romania seems to have thought this in 1984, before changing its opinion in 1985: A/C.6/39/SR.43, p. 14. See also: Simma, loc. cit. above (n. 21), at pp. 308–9 and 314.

State injured by a breach to receive help from other States if it is to have a reasonable chance of enforcing its rights against the wrongdoer. Another comes from the difficulty of relying on the injured State to take sufficient action to enforce the obligation breached and so uphold its ability to guide and determine conduct while also preventing its very content being altered and amended. These two sources of pressure are distinct: they are moved by different practical and legal considerations, and they consequently favour discrete legal solutions. However, they both challenge the common assumption that, under the majority of multilateral treaties, only one party, or else a small number of the parties, is vested with remedial rights in the event of a breach.

While grave dangers are likely to attend granting every party to a multilateral treaty the right to react to its breach, these can be solved, at least in theory, by subjecting the exercise of those rights to a degree of institutional control. Moreover, placing the reaction to a breach under the charge of some international organ or centralized body is necessary if those rights are to attain the purpose for which they are conferred and so represent an effective instrument of law-enforcement.²⁷² Yet it is here that the major problem lies. At its current stage of development, international legal society does not possess institutions which are sufficiently developed both to organize and ensure effective reaction to international wrongs and to prevent and control erroneous and abusive responses to alleged or actual violations of international law.²⁷³ In these circumstances, to recognize solidarity rights of the type described, vested in every party to a multilateral treaty, would be to create '[un] déséquilibre entre la norme et l'institution',²⁷⁴ and to widen the already present 'gap between advances in substance and lack of institutional progress' in the international legal system,²⁷⁵ with dangerous results.

At the same time, it is the very deficiencies of organization in the international legal system which create the pressure to recognize solidarity rights. It is the absence of any centralized agency to enforce the rights of the victims of international wrongs which creates the need to look elsewhere to attain that end; and it is the lack of any body to repress breaches of treaties which makes it necessary to consider other means of upholding the legal standards which multilateral conventions create. The deficiencies of

²⁷² Leben thus writes that most of the conditions which need to be fulfilled if countermeasures against a wrongdoer are to have any realistic prospects of success 'supposent . . . que l'on se situe, non pas dans le cadre d'une société internationale «anarchique», mais dans celui d'une société centralisée, c'est-à-dire actuellement dans le cadre des Nations Unies': loc. cit. above (n. 18).

²⁷³ Noteworthy, especially in view of Riphagen's proposals in relation to international crimes (see text at nn. 256-8 above), are the many reservations attracted by Article 66(a) of the Vienna Convention on the Law of Treaties, which provides that disputes relating to whether a treaty is void or terminates on account of its inconsistency with rules of *jus cogens* can be referred, at the request of one party, to the International Court. Such reservations have even been made by the very States which sponsored this provision at the Vienna Conference.

²⁷⁴ Dupuy, loc. cit. above (n. 12), at p. 486.

²⁷⁵ Simma, loc. cit. above (n. 21), at p. 315.

international organization, therefore, both create the need for solidarity rights and preclude its being met in any satisfactory way; and, if this need will inevitably prompt States sometimes to take action by way of solidarity, the problems which those claims bring with them are likely to perpetuate the ambivalence which surrounds the lawfulness of such measures.

NOTE

CANADIAN LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY*

By L. C. GREEN¹

It has often been assumed that the campaign for the trial and punishment of war criminals is a modern innovation, based on feelings of revenge and political ideology rather than on legal considerations. In fact it can be traced back to the code of chivalry that prevailed in the Middle Ages among the orders of knighthood,² while in the early part of the sixteenth century Vitoria was asserting³ that

a prince who has on hand a just war is *ipso jure* the judge of his enemies and can inflict a legal punishment on them, according to the scale of their wrongdoing.

Perhaps it may be pointed out that ever since Machiavelli, at least, no prince has ever conceded that he was unjust or that the war in which he was engaged was other than just. The very concept of aggression⁴ indicates that those who confront the aggressor are assessing his conduct as unjust.

The Second World War was followed by a series of trials for war crimes that were committed in all theatres of war and, because of the nature of publicity and the unwillingness of the victors to suggest that their troops were on occasion not much better than the enemy, it appeared that such trials were based on nothing but 'victors' justice'. However, there were trials of allied personnel for offences which, had they been committed by the enemy, would have been condemned as war crimes. Thus Captain Smith of the Royal Army Medical Corps was tried for violent acts against German prisoners of war,⁵ while 'the United States Army in Europe, during the period from June 1944 to the conclusion of hostilities in May 1945 court martialed and executed 95 American soldiers for acts of misconduct against noncombatant civilians or prisoners of war'.⁶ All these trials, however, were conducted under national rather than international law, even though the measure of the offence charged may have been in accordance with the law of war.

By 1949, pressures were on for 'mercy' to be shown and demands were being put

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² See, e.g., Keen, *The Laws of War in the Middle Ages* (1965), ch. 3; see also Schwarzenberger, *International Law*, vol. 2, *Armed Conflict* (1968), ch. 39—'The Breisach Trial of 1474'.

³ *De Indis Noviter Inventis* (1532), sec. III, proposition VII, proof 3 (Carnegie translation, 1917, p. 156).

⁴ See, e.g., *Nuremberg judgment* (1946): 'To initiate a war of aggression is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole': Cmd. 6964 (1946), p. 13; *American Journal of International Law*, 41 (1947), p. 167 at p. 186. See also General Assembly Resolution 3314(XXIX), Art. 5: 'A war of aggression is a crime against international peace'.

⁵ *The Times* (London), 8, 10, 12, 13, 14 April, 1, 28, 29 May, 1, 17 June 1948.

⁶ Parks, 'Crimes in Hostilities,' *Marine Corps Gazette*, vol. 60, no. 9 (September 1976), p. 16.

forward for clemency or amnesty.⁷ In addition, political alliances had changed and by 1949 or 1950 the western allies, at least, were proving far less willing to initiate trials themselves or to co-operate with members of the Soviet *bloc* in seeking out alleged war criminals or extraditing them when their identity or location was known.⁸ However, from the point of view of survivors or the relatives of victims, as well as various organizations of ex-service personnel, the pressure was still on for trials to be held and even the United Nations adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,⁹ adopted partly because of fear that periods of limitation in national criminal codes would result in granting an immunity on purely formal grounds. By December 1987, however, this Convention had been ratified by only 30 States, none of them from the 'western' world, not even by those which suffered enemy occupation. It has been ratified by the German Democratic Republic, but not the Federal Republic, although the latter has amended its criminal legislation to remove the protection of a limitation period in respect of those charged with war crimes. Perhaps it was as a result of the relatively few ratifications of the Convention that the General Assembly adopted in December 1983 a resolution on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.¹⁰ Although adopted with none opposing, only 94 States voted in favour, while 29 abstained. Despite the adoption of this resolution, there has been very little evidence of such co-operation. Equally there is very little to show in practice as a result of the adoption by the Council of Europe of its Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.¹¹

Regardless of the unwillingness to accept treaty obligations in this field, a number of countries have in recent years responded in a variety of ways to the pressures brought upon them by the public with regard to renewing the campaign against war criminals and bringing suit against them when possible. This campaign, together with allegations of complicity in war crimes against Kurt Waldheim,¹² the former Secretary-General of the UN, has received a variety of responses. Perhaps most important has been the decision of the former members of

⁷ See, e.g., *The Times*, 20 December 1949, 12 January 1950, 15 November 1950, 1 February 1951, 21 July 1953; see also Office of US High Commissioner for Germany, *Landsberg: A Documentary Report*, APO 757-A (1951) (reprinted from February 1951 issue of *Information Bulletin*, official magazine of US High Commissioner for Germany).

⁸ See, e.g., Polish protest at British refusal, *Polish Facts and Figures*, No. 178 (17 December 1949), published by the Polish Embassy, London. In May 1988 the Canadian Minister of Justice stated that Canada 'will continue to reject requests from the Soviet Union which has asked repeatedly for the return of suspects even though it has no extradition treaty with Canada. . . . Historical research undertaken for the [Deschênes Commission of Inquiry on War Criminals] suggested that although the requests were turned down for technical legal reasons [—absence of an extradition treaty—], the real motive was political reluctance to send a suspect for trial in a Communist country': *Edmonton Journal*, 13 May 1988.

⁹ 1968: *United Nations Treaty Series*, vol. 754, p. 73.

¹⁰ Res. 3074(XXVIII).

¹¹ *International Legal Materials*, 13 (1974), p. 540—not in force, having been ratified only by France.

¹² *The Times*, 13 May 1986, 30 November 1987; see Bossman, 'A Protest Against Waldheim', *Christian-Jewish Relations*, 20 (1987), p. 18; World Jewish Congress, *Kurt Waldheim's Hidden Past: An Interim Report* (1986); see also pieces by Bower, *The Times*, 18, 19, 20 January 1988.

the UN War Crimes Commission authorizing the Secretariat of the UN, as depositary of the relevant files, to make these available to interested parties. As a result, the German Federal Republic's Nazi War Crimes Centre at Ludwigsburg has announced that it is undertaking a vigorous examination of charges against no less than 30,000 persons, including 4,500 accused of murder,¹³ although 'many of the suspects may not come before the courts because they are now in their eighties and, like several other elderly suspects in recent years, will be able to find doctors who will pronounce them "unfit"'.¹⁴

Even prior to this an impetus was given to the campaign by the decision of the United States to amend its immigration laws rendering subject to deportation all persons who, in association with Nazi Germany or its allies, 'ordered, incited, assisted, or otherwise participated in the persecution of any persons because of race, religion, national origin, or political opinion',¹⁵ and an Office of Special Investigations was established to undertake the relevant investigations. Because of doubts as to the constitutionality, on grounds of retroactivity, of amending the federal criminal code for this purpose, the OSI had recourse to deportation and denaturalization proceedings on grounds of illegal procurement of naturalization or immigrant status by reason of concealment of past activities.

By the end of April 1987, the OSI . . . had brought legal proceedings against 53 suspected Nazi criminals, obtained 21 denaturalization orders, and actually deported 5 suspects, two of them to the Soviet Union. In addition, 7 individuals are known to have fled the United States rather than face or complete such legal proceedings.¹⁶

Of these, perhaps the best known are Demjanjuk, extradited to Israel on charges of murder contrary to the Israeli Nazis and Nazi Collaborators (Punishment) Law,¹⁷ and Artukovic, extradited to Yugoslavia, where he was sentenced to death and died in gaol in January 1988.¹⁸

Agitation for the discovery and prosecution of war criminals became a major issue in Australia during 1985 and 1986 and an official investigation was instituted. As a result of a finding in the *Menzies Report*¹⁹ that 'it is more likely than not that a significant number of persons who committed serious war crimes in World War II have entered Australia and [that] some of these are now resident in Australia', a Special Investigations Unit was established and in 1987 the War Crimes Amend-

¹³ *The Times*, 4 January 1988.

¹⁴ Statement by Dr Streim, Director of Ludwigsburg War Crimes Centre, *ibid.*, 30 December 1987. See also decision of US Justice Dept. not to deport Jacob Tannenbaum, 77, who concealed his past as a Polish Jewish kapo when securing citizenship. After admitting he had brutalized Jewish prisoners his citizenship was 'surrendered', but deportation did not ensue because 'his age and failing health would make it life-threatening': *Globe and Mail*, 6 February 1988. See also *Public Prosecutor v. Menten* (1977/81), 75 ILR 331, 366-7.

¹⁵ The Holtzman Amendment, 1978, Public Law No. 95-549, 92 Stat. 2065.

¹⁶ Rosebaum, 'The Investigation and Prosecution of Suspected War Criminals: A Comparative Overview', *Patterns of Prejudice*, 21 (1987), p. 17 at p. 18.

¹⁷ *UN Yearbook on Human Rights*, 1950, p. 163. The denaturalization proceedings are reported 518 F Supp. 1362 (1981), and the extradition processes at 767 F 2d 922 (1985); 106 S Ct. 597. Demjanjuk was sentenced to death by the Israeli court.

¹⁸ The original request for extradition was made by Yugoslavia in 1956 and was rejected in 1959: *US, ex rel. Karadzole v. Artukovic*, 170 F Supp. 383. The extradition decision is at 628 F Supp. 1370, 784 F 2d 1354 (1986).

¹⁹ *Report on Review of Material Relating to the Entry of War Criminals into Australia*, 28 November 1986. In February 1988 it was announced that over 200 immigrants were under 'active investigation', with particular attention being paid to 15 suspects: *Globe and Mail*, 4 February 1988; see also *Commonwealth Law Bulletin*, 14 (1988), p. 1080.

ment Bill was enacted enabling war criminals present in Australia to be brought to trial before the Australian criminal courts.²⁰ Similar pressures have been brought to bear in the UK and the Home Secretary announced in November 1987²¹ that consideration was being given to a change in the law so that '16 alleged Nazi war criminals can stand trial in Britain', although there was the suggestion that an alternative might be to strip British nationality from those who had acquired it 'fraudulently'. It was considered that extradition to Israel was unlikely. Shortly after this statement had been made, it was disclosed²² that the Home Secretary was

considering the introduction of a short bill to enable Mr Antanas Grecas, an alleged Nazi war criminal, to be brought to trial. The Soviet authorities have asked for his extradition to face charges of committing atrocities in Nazi-occupied Lithuania but [the Home Secretary] has ruled that out . . . Under the present law Mr Grecas, aged 71, of Edinburgh, cannot stand trial because he was not a British subject at the time of the alleged offences, which he denies.

In February 1988 the Home Secretary established an independent committee of inquiry

to examine allegations that as many as 17 Nazi war criminals are living in Britain. . . . The investigation team, which may conduct interviews in the Soviet Union, which now controls the territories where the alleged crimes were committed, will advise the Government on whether the law should be changed to allow British courts to try crimes committed overseas by people living in this country. . . . An extension of the jurisdiction of British courts would be necessary because, although crimes in foreign countries are normally dealt with by extradition, the cases in question relate to crimes in territories controlled by the Soviet Union with whom there is no extradition treaty. British courts do not have jurisdiction to try offences of murder and manslaughter when the accused was not then a British subject.²³

This statement was followed by an appeal by the War Crimes Inquiry for those possessing *any* information that they might think relevant, or knowing of anyone in the UK or overseas who might be thought to have such information, to inform the Inquiry thereof.²⁴ As a result of these measures, the Ministry of Defence reopened its files concerning an alleged massacre of British and Canadian prisoners of war at Dunkirk involving the former Major General Mohnke.²⁵ The German authorities undertook 'to reopen their investigation . . . if new evidence was presented to them',²⁶ while Canada also promised to co-operate.²⁷ Other countries have used other methods of dealing with the problem. Thus, in one case, *Federal Republic of Germany v. Rauca*,²⁸ Canada extradited a Canadian naturalized German to the Federal Republic in accordance with the Extradition Treaty between the two countries²⁹ on charges of murder. The case was complicated by the defence contention

²⁰ *The Times*, 28 November 1987.

²¹ *Ibid.*, 23 November 1987.

²² *Ibid.*, 4 December 1987. See also case of Paul Reinhardt 'on a list of 16 people being investigated by the Home Office': *ibid.*, 9 February 1988.

²³ *Ibid.*, 9 February 1988.

²⁴ *Ibid.*, 25 March 1988 (italics in original advertisement).

²⁵ *Ibid.*, 21, 22 April 1988.

²⁶ *Ibid.*, 22 April 1988.

²⁷ *Edmonton Journal*, 13 May 1988.

²⁸ (1982) OR (2d) 705, 41 OR (2d) 225; he died in a German gaol.

²⁹ *Canadian Treaty Series*, 1979, No. 18.

that under Canada's Charter of Rights,³⁰ since Canadians had the 'right to enter, remain in and leave Canada', it would be unconstitutional to grant the extradition request. It was held, however, that extradition was among 'the reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' and thus within the limitations prescribed in Article 1.³¹ Other countries, lacking extradition arrangements, have proceeded by way of deportation to the country seeking to try the alleged war criminal, as was done by Bolivia when it sent Barbie—the 'Butcher of Lyon'—to France.³²

The *Rauca* trial further stimulated argument in Canada as to the correct procedure for the trial of war criminals and ultimately led to the establishment in 1985³³ of the Deschênes Commission of Inquiry on War Criminals, which reported in December 1986. One of the questions put to the Commission concerned the applicability of the War Crimes Act 1946,³⁴ giving statutory basis to the War Crimes Regulations of 1945, and which are appended to the Act as a Schedule. The Regulations were based on those in use by the British forces.³⁵ They were intended to set out the regime whereby Canadian military tribunals would be able to try any war criminals among enemy personnel falling into their hands. In so far as Canadian personnel might have been guilty of war crimes, proceedings against them would have been in accordance with the Canadian Criminal Code or the UK Army Act³⁶ which then governed the Canadian military forces.

Since the Regulations were introduced before the London Charter establishing the Nuremberg Tribunal,³⁷ the jurisdiction of the tribunals was limited to war crimes and there is no mention of crimes against humanity. This becomes clear from the definition of 'war crime' as 'a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939'—when Canada officially entered the Second World War. This means that such crimes as were later described as crimes against humanity would only be susceptible to Canadian military jurisdiction if they were in fact also war crimes in the traditional sense of that term. That the jurisdiction was of a restricted and not universal character is clear from the reference in the definition to 'wars in which Canada is a belligerent'. It is important to note that although the Act has never been repealed, its existence was overlooked by the compilers of the 1970 edition of the *Revised Statutes of Canada*. Prima facie, since the Act is still in force its terms will authorise the prosecution of war crimes whenever committed so long as this was during a war in which Canada was a belligerent. It would have been possible, therefore, to have made use of it during the Korean War, so long as those charges were limited to traditional war crimes.

While it might have been thought that, in accordance with the fact that international law recognizes a belligerent's authority to try war criminals, there was no

³⁰ Constitution Act 1982, s. 6(1).

³¹ It should be noted, however, that the Supreme Court seems to have limited the scope of this concept in *Morgentale et al. v. The Queen and the Attorney-General of Canada*, [1988] 1 SCR 30.

³² *The Times*, 8 March 1983. See, for allegations of war crimes by Barbie against British prisoners of war, James, 'Barbie's Forgotten Victims', *The Times*, 1 May 1987.

³³ Order in Council, PC-1985-348, 5 February 1985.

³⁴ 10 Geo. VI, c. 73.

³⁵ HMSO, *Manual of Military Law* (1958), Part III, 'The Law of Warfare on Land', Appendix 25.

³⁶ 1881, 44 & 45 Vict., c. 58, as amended.

³⁷ Schindler and Toman, *The Laws of Armed Conflicts* (1988), p. 911.

need for statutory authority to this effect, the purpose of the Regulations and of the Act was to define the method by which the jurisdiction was to be established. By Regulation 4(1),

Any Canadian flag, general or air officer commanding any Canadian forces, wherever such forces may be serving, whether in the field or in occupation of enemy territory or otherwise . . . shall have power to convene military courts for the trial of persons charged with having committed war crimes and to confirm the findings and sentences of such courts: Provided that no military court shall be convened for the trial of any person for a war crime unless the case has been certified by the Judge Advocate General . . . as approved for trial.

In accordance with Regulation 6, such trials shall be available as follows:

- (1) If it appears to a convening officer that a person then within the limits of his command or otherwise under his control has at any place committed a war crime he may direct that such person if not already in custody shall be taken into and kept in custody pending trial in such manner and in such charge as he may direct.
- (2) The commanding officer of any body of naval, military or air forces having charge of an accused shall be deemed to be the commanding officer of the accused for the purposes of all matters preliminary and relating to trial and punishments; or deal with the accused summarily for a war crime
- (3) The accused shall not have the right of having a summary taken or of demanding that the evidence at the summary shall be taken on oath or that any witness shall attend for cross-examination at the trial.

It would appear from this language that the jurisdiction conferred is wide enough to operate at any time after 9 September 1939 and in any place and to be exercised against any person, civilian or otherwise, for the authority able to convene the relevant court martial may be serving 'in the field or in occupation of enemy territory *or otherwise*', and since the whole of Canada is divided into military commands it would seem that if a person within 'the limits of [that] command . . . has *at any place* committed a war crime' the jurisdiction could extend to him. However, in the light of Regulation 7 it would seem that such trials are in fact intended, in the first instance, for members of the military forces. For

- (1) A military court shall consist of not less than two or more than six officers in addition to the president
- (2) If the accused belongs to the naval, military or air forces of an enemy or ex-enemy power, or if Canadian naval, military or air force personnel are in any way affected by the alleged war crime,³⁸ the convening officer should appoint . . . at least one naval, military or air force officer as a member of the court, as the case may be.
- (4) . . . where any war crime appears to affect the interest of any Allied power, including any member of the British Commonwealth of Nations, a convening officer may:
 - (a) invite one or more officers of the naval, military or air forces of such Allied power to become a member or members of the military court convened to try the person or persons charged with having committed the offence, in which case any officer so invited may sit as a member of the military court;
 - (b) appoint as a member of the court one or more officers of an Allied force serving under his command . . .
- (5) Any Allied officer sitting as a member of a military court . . . shall be vested with the

³⁸ In fact, all war crimes trials conducted by the Canadian forces related to offences against Canadian prisoners of war.

same rights, duties and powers as an officer of the Canadian forces duly appointed to serve as a member of such a court.

Since the courts are clearly military tribunals, *prima facie* their authority would be limited to military personnel, but it is recognized in the law of armed conflict and in the practice of war crimes tribunals generally that civilians too may be among the accused,³⁹ and there is no reason why this should not be the case in the event of a Canadian military court being appointed under the War Crimes Act. But this would not alter the status of the tribunal, nor would such a civilian be protected by the normal rules of criminal procedure. By Regulation 10 the evidence that such a court may receive is directed at enabling the court to reach a decision without being limited by any restrictive formalities, nor by reason of the fact that witnesses at such trials may not be too certain of such things as dates, while much of the evidence might relate to statements made by victims dead by the time of trial. Thus,

(1) . . . the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document *appears to the court to be of assistance in proving or disproving the charge*, . . . and . . . in particular:

- (a) if any witness is dead or unable to attend or to give evidence or it is, in the opinion of the court, not practicable for him to do so, the court may receive secondary evidence of statements made by or attributable to such witness;
 - (b) any document purporting to have been signed or issued officially by any member of any Allied . . . or enemy force or by any Allied . . . , neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof;
 - (c) the court may receive as evidence of the facts therein stated any report of the 'Comité International de la Croix Rouge' or by any representative thereof, by any member of the medical profession or of any medical service, by any person acting as a 'man of confidence' (*homme de confiance*),⁴⁰ or by any other person whom the court may consider was acting in the course of his duty when making the report;
 - (d) the court may receive as evidence of the facts therein stated any depositions or any record or any report of any military court or military court of inquiry or of any examination made by any officer detailed for the purpose by any military authority;
 - (e) the court may receive as evidence of the facts therein stated any diary, letter or other document *appearing to contain information relating to the charge*;
 - (f) if any original document cannot be produced or, in the opinion of the court, cannot be produced without undue delay, a copy of such document or other secondary evidence of its contents may be received in evidence;
 - (g) any statement made prior to trial by an accused or by any witness at such trial, whether or not such statement was made on oath, and whether made before or after or without the giving of any caution, shall be admissible in evidence for all purposes.
- [However]

(2) It shall be the duty of the court to judge the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible.⁴¹

It is clear that if an attempt were made today to try a civilian present in Canada,

³⁹ See, e.g., *Belsen trial (Kramer et al.)*, British Military Tribunal (1945), UN War Crimes Commission, *Trials of War Criminals*, vol. 2, p. 1; Phillips, *The Belsen Trial* (1949).

⁴⁰ See 1929 Prisoners of War Convention (Hudson, *International Legislation*, vol. 5, p. 21), Art. 43: 'Dans toute localité où se trouveront des prisonniers de guerre, ceux-ci seront autorisés à désigner des hommes de confiance chargés de les représenter *vis-à-vis* des autorités militaires et des Puissances protectrices'. The English text uses the term 'representatives'.

⁴¹ Emphasis added.

regardless of his nationality, under these Regulations problems would arise in connection with what is understood to be the rule of law and a fair trial.⁴² Moreover, problems would arise in view of the fact that the British Army Act no longer has any relevance for the Canadian forces, and there is no provision for statutory succession in the National Defence Act⁴³ or that part of it which constitutes the Code of Service Discipline.⁴⁴ It may be arguable, however, that in accordance with section 36(a) of the Interpretation Act,⁴⁵ since the relevant provisions of the Army Act have not been repealed by any specific Canadian legislation, they still apply, even though the UK Army Act and provisions regarding the trial of war criminals have been radically amended.⁴⁶ Unless Canada, or that 'command' wherein an alleged war criminal was found, were placed under martial law, it is difficult to appreciate the grounds upon which a local commander would acquire the authority to place under his command and arrest a Canadian citizen or some other civilian and hold him for trial before a military court. Regardless of the political reaction that any such attempt would generate, problems would arise under the Canadian Charter of Rights and Freedoms.⁴⁷ Section 7 guarantees 'everyone the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice', and section 15 states that 'every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination'.⁴⁸ It can hardly be suggested that to subject a Canadian citizen or an alien lawfully present in Canada to military arrest and trial, authorized not by a Crown prosecutor but by the Judge Advocate General, rather than by the ordinary courts, and to subject such a person to a procedure lacking the guarantees provided for others charged with criminal offences would be in accord with the principles of fundamental justice or would amount to equality before and protection of the law.

In view of the difficulties herein outlined, it is hardly surprising that in its *Report* the Deschênes Commission shared 'the view expressed in his brief by Mr John I. Laskin:⁴⁹ "the procedures under the War Crimes Act would not stand up to the legal guarantees in the Charter. The Act is essentially an out-dated piece of legislation⁵⁰ enacted at another time and for another purpose." The Commission accordingly *FINDS* 18—No prosecution for Nazi war crimes can be successfully launched under the War Crimes Act as it now stands.'⁵¹

⁴² For a critical analysis of the War Crimes Act, see Green, 'Canadian Law and the Punishment of War Crimes', *Essays on the Modern Law of War* (1985), ch. 12; see also 'Canada's Role in the Development of the Law of Armed Conflict', *ibid.*, ch. 13.

⁴³ RSC 1970, c. N-4, as amended.

⁴⁴ Parts IV-IX.

⁴⁵ RSC 1970, c. I-23.

⁴⁶ Armed Forces Act 1981, c. 55, as amended 1986, c. 21.

⁴⁷ Constitution Act 1982 (UK, c. 11), Part I.

⁴⁸ It should be noted that in its *Report* the Deschênes Commission drew attention to s. 11 and pointed out that the guarantee of jury trial does not apply to 'an offence under military law tried before a military tribunal'. However, it stated that it was not 'certain' that a 'war crime' was an 'offence under military law': *Report*, p. 122. See also the Supreme Court's comments on these sections in the *Morgentale* case (above, n. 31).

⁴⁹ One of the Commission's Legal Counsel and Consultants.

⁵⁰ However, should another war take place in which Canada was a belligerent, it is submitted that military tribunals trying war criminals would proceed by way of the War Crimes Act.

⁵¹ *Report*, p. 123.

Not only did the Deschênes Commission reject the applicability of the War Crimes Act, but it held that there was no way Canadian jurisdiction could be extended to offences that were alleged to have been committed in violation of the Geneva Conventions of 1949⁵² and the consequential Canadian legislation.⁵³ It had been suggested⁵⁴ that the grave breaches listed in the four Conventions were and always had been breaches of the law of armed conflict and, as such, war crimes.⁵⁵ Since the Geneva Conventions Act gave legislative effect to the Conventions it followed that these offences were now punishable by Canadian courts. Had the Act merely been procedural, providing a method for trying offences which already existed, this contention would have been feasible, at least in the case of Canadian offenders. It might have been more difficult to maintain that it also grounded jurisdiction against those offenders who had no relationship with Canada at the time of the commission of their offence. It is here that the position differs from the Israeli exercise of jurisdiction against Adolph Eichmann.⁵⁶ However, no jurisdiction could possibly arise in so far as the Geneva Conventions created offences which had not amounted to war crimes during World War II. All the offences which were within the conspectus of the Deschênes Commission had been committed by the latter part of 1945, and therefore any attempt to bring them within the Act would have offended against the principle of retroactivity, contrary to both the Canadian Charter of Rights⁵⁷ and the International Covenant of Civil and Political Rights⁵⁸ to which Canada is a party.

The situation is comparable to the Israeli decision that Eichmann could not be charged with genocide *per se*, since this did not become recognized as a clear crime in the light of international law until the adoption of the Convention in 1948,⁵⁹ even though the charges against him amounted to this offence.⁶⁰ But as the District Court of Jerusalem pointed out,⁶¹ the duty under the Convention to legislate criminality in respect of genocide is 'for cases of genocide which will occur in the future after the ratification of the treaty or the adherence thereto by the State or States concerned', a point reiterated in the *Rauca* case:⁶² 'Not only is the Geneva Conventions Act not a statute of general application, but it is a piece of substantive law which does not have a retroactive effect'. In view of this it was not surprising that the Commission considered⁶³ that 'no prosecution for Nazi war crimes can be successfully launched under the Geneva Conventions Act as it now stands'. On the other

⁵² Schindler and Toman, *op. cit.* above (n. 37), pp. 373-556.

⁵³ Geneva Conventions Act, 1964-65, c. 44, RSC 1970, c. G-3.

⁵⁴ *Deschênes Report*, p. 123.

⁵⁵ This point is made clear in Protocol I, 1977 (Schindler and Toman, *op. cit.* above (n. 37), p. 621), Art. 85(5): 'Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes'.

⁵⁶ *Attorney-General of Israel v. Eichmann* (1961/1962), 36 ILR 5, 277.

⁵⁷ *Loc. cit.* above (n. 47), Art. 11(g).

⁵⁸ 1966: *United Nations Treaty Series*, vol. 999, p. 171, Art. 15 (acceded to by Canada in 1976).

⁵⁹ *Ibid.*, vol. 78, p. 77 (ratified by Israel in 1950, and acceded to by Canada in 1952).

⁶⁰ The District Court pointed out that the 'crime against the Jewish people' with which he was charged 'is defined on the pattern of the crime of genocide defined in the Convention': *loc. cit.* above (n. 54), p. 30.

⁶¹ At p. 36. See Green, 'The Maxim *Nullum Crimen Sine Lege* and the Eichmann Trial', *this Year Book*, 38 (1962), p. 457.

⁶² *Loc. cit.* above (n. 28), p. 245.

⁶³ *Report*, p. 126.

hand, the Commission was of opinion⁶⁴ that the wording of Article 11(g) of the Charter, that an accused has the right 'not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations', was wide enough to allow Parliament to 'pass enabling legislation, even of a retroactive character, to permit the prosecution and punishment of war criminals'. This statement implies that, since the acts or omissions in question were already criminal under international law, any such legislation would be procedural as filling a jurisdictional lacuna.⁶⁵ However, a major problem would arise in seeking to ascertain just what is meant by the 'general principles of law recognized by the community of nations'. It would appear that this is, by way of a concession to some modern States, a substitute for the wording of Article 38 of the Statute of the International Court of Justice, whereby the 'general principles of law recognized by civilized nations' constitute rules of international law. The difficulty lies in determining what are 'general principles of law' and what percentage of the world's States constitutes a sufficient proportion to be considered 'the community of nations'. Does this collection have to include every major power or be representative of all the leading legal systems of the world?⁶⁶

As regards the various contentions that there were large numbers of war criminals present in Canada, the Commission found as a result of its researches, including a study especially prepared for it on 'Nazi War Criminals in Canada: The Historical and Policy Setting from the 1940s to the Present',⁶⁷ that sufficient evidence existed concerning some for the Canadian Government to seek the co-operation of those governments in whose territory incriminating evidence existed, that in other cases serious consideration should be given to the institution of proceedings, and that in others steps should be taken towards the revocation of citizenship.⁶⁸ It opposed the creation of any organ like the American Office of Special Investigation, suggesting that a special team of lawyers, historians and police officers be established under the auspices of the Department of Justice and the Royal Canadian Mounted Police,⁶⁹ although it is a little difficult to see how in substance, as distinct from independence, this would differ from the position in the US. The proposal has been followed through with the establishment of such a body within the Department of Justice. The Commission recommended⁷⁰ that, as had already been done in the *Rauca* case, requests for extradition from the Federal Republic of Germany should be 'favourably considered', and that the 1967 Extradition Agreement with Israel⁷¹ be amended to enable extradition of war criminals at that country's request. In January 1988, the Canadian Government announced that, while it would not amend this treaty to enable such extradition to take place, agreement had been reached with Israel for mutual co-operation in gathering evidence

⁶⁴ Ibid., p. 148.

⁶⁵ See Green, loc. cit. above (n. 61).

⁶⁶ See Green, 'General Principles of Law and Human Rights', *Current Legal Problems*, 8 (1955), p. 162; 'New Trends in International Criminal Law', *Israel Yearbook of Human Rights*, 11 (1981), p. 9 at pp. 26-30.

⁶⁷ By Alti Rodal (1986), esp. ch. XI, XII and Conclusions.

⁶⁸ *Report*, pp. 13-14.

⁶⁹ Ibid., p. 830.

⁷⁰ Ibid., pp. 4-5.

⁷¹ As amended 1969: *Canadian Treaty Series*, 1969, No. 25.

against persons so accused.⁷² A similar agreement has been made with the Soviet Union.⁷³ In both cases, any material or evidence produced will be subject to Canadian standards of proof. Most significantly the Commission was of opinion that the Criminal Code should be amended to enable prosecution in Canada of those accused of war crimes and crimes against humanity,⁷⁴ while 'procedures leading to revocation of citizenship (denaturalization) and to deportation—at least in cases as suspected Nazi war criminals—should be streamlined and consolidated.'⁷⁵

There was a certain amount of opposition to the acceptance of these proposals, particularly from those who felt that in view of the years that have elapsed since the end of the War it was unwise to renew ancient hatreds and unfortunate memories. Equally, a number of ethnic groups from eastern Europe were opposed to any such legislation, although they favoured the prospect of a wide definition of crimes against humanity contending, for example, that the Ukrainian famine of the twenties and thirties constituted a crime against humanity and warranted at least condemnation as such, even though it might not be possible to prosecute those Soviet officials whom they considered responsible. They were also opposed to limiting any new legislation to Nazi war crimes, arguing that criminal acts had also been committed by some Allied armies and drawing attention to the Katyn massacre of Polish officers, allegedly by Soviet forces.⁷⁶ Moreover, since it was alleged that many suspected of war crimes and crimes against humanity, particularly when committed against civilians in concentration camps in occupied Europe, were in fact recruited from eastern Europe, there was a fear that campaigns against these persons could easily deteriorate into a general 'blackening' of all immigrants from those countries. It was further contended that since many of the camps where these atrocities had taken place were now situated in 'communist' countries which regarded emigrants as traitors, it was virtually certain that any evidence, oral or documentary, emanating from there would be forged. Similar accusations had been made with regard to the American Office of Investigation but that body as well as the courts involved in deportation proceedings had in fact been completely satisfied that materials coming from those areas was authentic and stood up to any investigation that had been launched against them. In fact, the Deschênes Commission reported there was no reason in law or logic not to collect evidence from abroad, so long as such evidence be gathered in an acceptable form and be assessed for its validity and worth as any other evidence however gathered.⁷⁷ In so far as time limits are concerned, it is perhaps enough to point out that in many cases suspects have secured protection by entering Canada under false pretenses or by perjury, while in others surgical alterations of the physiognomy have made identification difficult. It might also be pointed out that in many cases the delay is not proportionate to the number of years that may have elapsed, but must be measured against the time since the authorities became aware of the presence of a

⁷² Ministry of Justice and Attorney-General of Canada, News Release, 22 February 1988. An agreement of the same kind was made with The Netherlands: *ibid.*

⁷³ *Id.*, News Release, 10 February 1988.

⁷⁴ *Report*, p. 6.

⁷⁵ *Ibid.*, p. 7.

⁷⁶ See, e.g., Zawodny, *Death in the Forest* (1972). In July 1988 there were hints that the Soviet Union might be ready to revise its attitude to this massacre: *The Times*, 4 July 1988.

⁷⁷ See, e.g., *Report*, Appendix I–M. See also *Public Prosecutor v. Menten*, loc. cit., above (n. 14), at p. 342.

particular accused. Beyond this, however, there is the problem of the reliability of the memory of witnesses after so long a period, together with the risk that events, dates and persons become coalesced in the course of remembering. Moreover, by Article 11(b) of the Charter of Rights, 'any person charged with an offence has the right to be tried within a reasonable time'. In *R v. Young*⁷⁸ the Ontario Court of Appeal was faced with the question how far delay was compatible with the 'principles of fundamental justice' mentioned in Article 7 of the Charter.⁷⁹ Speaking for a unanimous court, Dubin J stated:

. . . there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.

The Deschênes Commission drew attention to the Supreme Court's adoption of this dictum in *R v. Jewett*,⁸⁰ and continued:⁸¹

Whether the long delay before laying charges against war criminals would bring the courts to exercise that power is . . . a question which the Commission should not embark on trying to answer. For in doing so, it would trench upon the prerogatives of both the Executive and the Judiciary: the Executive, which will have to consider the situation of fact and of law in light of the Commission's individual recommendations concerning various suspects, and must then decide whether prosecutions are warranted; and the Judiciary which may have to rule on the question in light of the facts and circumstances which will then be established. In both cases, it would not behove this Commission to preempt a decision by the proper authority.

In 1987 Bill C-71 became law and adopted the broad principles laid down by the Deschênes Commission. The Immigration Act⁸² was amended so as to deny immigration to

persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 6(1.96) of the Criminal Code or that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

Further, deportation could be ordered of any person so defined, even if he had been granted rights of immigration. Similarly, amendments were made to the Citizenship Act⁸³ to deny citizenship to any person under investigation or convicted of such an offence. It does not, however, specifically provide for revocation of citizenship.

More important were the amendments to the Criminal Code.⁸⁴ Section 6 of the Code is amended so that

(1.91) Notwithstanding anything in this Act or any other Act, every person who, either

⁷⁸ (1984) 10 CCR 307, 340.

⁷⁹ 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

⁸⁰ [1985] 2 SCR 128, 136.

⁸¹ *Report*, p. 150.

⁸² 1976-77, c. 52, as amended.

⁸³ 1974-75-76, c. 108, as amended.

⁸⁴ RSC 1970, c. C-34, as amended.

before or after the coming into force of this subsection, commits an act or omission outside Canada that constituted a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

- (a) at the time of the act or omission,
 - (i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,
 - (ii) that person is a citizen of, or is employed in a civilian or military capacity by a state that is engaged in an armed conflict against Canada, or
 - (iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or
- (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada, and subsequent to the time of the act or omission the person is present in Canada.

The first thing to notice about this provision is that it does not, as had originally been suggested, provide for universal jurisdiction. *Ab initio* the proposal had been to assume jurisdiction over such acts or omissions committed in any armed conflict whether Canada was a belligerent or not. This wide assumption of jurisdiction would have enabled Canada to prosecute, for example, any US serviceman accused of having committed his offence in Vietnam. It is now provided that the jurisdiction for war crimes only extends to offences arising during a war in which Canada is a belligerent, for it makes clear that the person charged, unless he is a Canadian or employed by Canada, must have committed his offence during 'an armed conflict against Canada', and that the victim, if not a Canadian, must have been 'a citizen of a state that is allied with Canada in an armed conflict'. In so far as members of the Canadian armed forces are concerned, the provision is unnecessary, for they are liable to both the Criminal Code and the provisions of the National Defence Act, and the subsection stipulates that the act in question would have to 'constitute an offence against the laws of Canada in force at the time of the act or omission', a provision which indicates that the subsection is also redundant in regard to Canadian citizens. Surprisingly, although the amendment refers to both Canadians and enemy personnel, it makes no provision for trial of offenders belonging to an allied force. Presumably, it is anticipated that such an offender will face trial by his own authorities. On the other hand, it means that there is no way whereby, for example, Soviet personnel involved in the Katyn massacre could be tried in accordance with this amendment. Equally, no provision is made for the trial of enemy personnel if the victim of the crime alleged to have been committed is an enemy national, as were so many victims of Nazi atrocities. On the other hand, it might be argued that, despite this silence, (a)(ii) is wide enough to permit such trial. Despite the apparent abandonment of any claim to universal jurisdiction, the Canadian Minister of Justice appears to believe that such jurisdiction does exist. In reply to criticism by East European groups that his Department is confining its activities to Nazi war criminals, the Minister stated⁸⁵ that any war criminal found in Canada will be prosecuted:

The law is generic and refers to all war criminals around the world. Specific cases that . . . are brought to our attention, regardless of where they arise, [will be given] serious attention.

⁸⁵ *Edmonton Journal*, 7 September 1988.

As to the method of trial, the amendment provides that this shall be

conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings . . . [and] the accused may . . . rely on any justification, excuse or defence available under the laws of Canada or under international law at that time [i.e. time of the offence] or at the time of the proceedings . . . but a person may be convicted . . . even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

This last proviso is in accord with traditional international law, whereby no State can put forward in justification of its act that municipal law made it impossible for it to comply with the requirements of international law.⁸⁶ On the other hand, a conflict could arise as between the international law attitude to the defence of superior orders⁸⁷ as compared with the Canadian defence of duress.⁸⁸ It is also clear that one charged with such an offence would not be able to put forward the argument that he was protected by the defence of 'political offence' as defined by Canada.⁸⁹ At the same time the proviso removes the defence of act of State.

Many of the persons who may be charged with war crimes by Canada may already have been tried *in absentia* by some European country in respect of offences which would fall within the Criminal Code as now amended. It is, however, expressly provided in the amending legislation that

A person who is alleged to have committed an act or omission outside Canada that is an offence in Canada by virtue [of the amendments to the Code], and in respect of which that person has been tried and convicted outside Canada, may not plead *autrefois convict*⁹⁰ with respect to a count that charges that offence if

- (a) at the trial outside Canada the person was not present and was not represented by counsel acting under the person's instructions, and
- (b) the person was not punished in accordance with the sentence imposed upon conviction in respect of the act or omission . . .

This proviso leaves open the question whether *autrefois convict* can be pleaded by one who has fled the jurisdiction, but has nevertheless instructed counsel to appear and, despite the defence submitted, has been found guilty. It also raises the question whether an accused sentenced to a particular term and subsequently pardoned or, for example, benefiting from a prisoner exchange⁹¹ could submit this plea since it might be argued that he 'was not punished in accordance with the sentence imposed'.

So far we have dealt with what might be considered procedural and jurisdictional

⁸⁶ See, e.g., *Alabama* arbitration (1872), Moore, *International Arbitrations*, vol. 1, p. 653; *Polish Nationals in Danzig* (1932) (PCIJ), Hudson, *World Court Reports*, vol. 2, p. 789 at p. 804; *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, p. 116 at p. 132.

⁸⁷ See Green, *Superior Orders in National and International Law* (1976), Part 2, esp. ch. XVII.

⁸⁸ See Criminal Code, s. 17.

⁸⁹ See, e.g., *Re Commonwealth of Puerto Rico and Hernandez* (1973), 30 DLR (3d) 260, (1974) 42 DLR (3d) 541, following *Re Castioni*, [1891] 1 QB 149, and *Schtraks v. Government of Israel*, [1962] 3 All ER 529. See, also, *The State (Ghana) v. Director of Prisons, ex p. Schumann* (1966), 39 ILR 433; *Kroeger v. Swiss Federal Prosecutor* (1966), 72 ILR 606.

⁹⁰ For a discussion of the *ne bis in idem* principle, see *Public Prosecutor v. Menten*, loc. cit. above (n. 14), at pp. 338-9.

⁹¹ This issue arose in Canada in 1987-8 in connection with deportation proceedings against Mahmoud Mohammed, originally convicted in Greece for participating in a terrorist attack against an aircraft at Athens airport.

issues. More important perhaps are the definitions of the substantive crimes to which these provisions refer, especially as it cannot be automatically assumed that the judge before whom an accused might appear is acquainted with principles or rules of international law. This problem is dealt with by subsection 1.96:

'crime against humanity' means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.

Reference has already been made to the difficulties of defining what is meant by 'principles of law recognized by the community of nations'. But this is not the only problem connected with this definition. While it rightly excludes the defence of local lawfulness, it makes it clear that the act referred to must have been illegal by international law at the time of its commission. By and large, this excludes all such inhumane acts committed in time of peace—if committed in time of war they would almost certainly amount to war crimes—prior to the post-1945 developments with regard to genocide and other criminal breaches of human rights, such as *apartheid*.⁹² It would not have any impact on such acts as the Ukrainian famine, for at the time that this occurred international law still recognized the absolute right of a State to treat its own nationals as it pleased. National domestic jurisdiction would only be impinged upon if the interests of a foreign State were involved. As to the future, a crime against humanity would only be justiciable in Canada if it contravened international law and, in accordance with subsection 1.91, 'Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada'. Genocide is, of course, a supreme crime against humanity and would clearly fall within the Canadian definition. However, in accordance with Article VI of the Convention,⁹³ until such time as there has been established an international penal tribunal possessing jurisdiction, it may only 'be tried by a competent tribunal of the State in the territory of which the act was committed'. In so far as *apartheid* is concerned, while the Convention of 1973 describes this as a crime against humanity, Canada is not a party to that Convention. On the other hand, it should be noted that this statutory definition of crimes against humanity appears wide enough to fill a lacuna in Protocol II of 1977,⁹⁴ when Canada ratifies that instrument. Protocol II concerning humanitarian law in non-international conflicts contains no provision concerning breaches or their punishment. The Canadian definition would enable a person whose breaches of the Protocol were grave enough to fall within the definition to be prosecuted under the amended Criminal Code should he be found in Canada, and the plea that he was a refugee from a civil war would not provide any defence.

'war crime' means an act or omission that is committed during an international armed con-

⁹² International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973: *United Nations Treaty Series*, vol. 1015, p. 244.

⁹³ Loc. cit. above (n. 59).

⁹⁴ Protocol Additional to the Geneva Conventions 1949, and relating to the Protection of Victims of Non-International Conflicts: Schindler and Toman, op. cit. above, (n. 37), p. 689.

flict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

Perhaps the most striking point about this is the limitation to international armed conflicts. Any act resembling a war crime committed during a non-international armed conflict would have to amount to a crime against humanity if it were to be amenable to Canadian jurisdiction. As to war crimes during an international conflict, there is no reference on this occasion to the 'general principles of law recognized by the community of nations', so we are left simply with customary and conventional international law. In fact, of course, if there were such a thing as a general principle recognized by civilized nations we would almost certainly be dealing with a principle which was in fact one of customary international law, for as the International Court of Justice has pointed out, 'the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States';⁹⁵ which is merely a more specific way of stating what already appears in Article 38 of the Statute of the International Court of Justice, enjoining it to apply 'international custom, as evidence of a general practice accepted as law'.

To assist the judge in determining the law he is to apply, subsection 1.96 provides a definition of 'conventional' but not 'customary' international law. Where the latter is concerned, he will have to rely either on his own assumptions or on such evidence as is brought forward by counsel to convince him that some rule is in fact expressive of *opinio juris* and accepted as such by Canada. However,

'conventional international law' means

- (a) any convention, treaty or other international agreement that is in force and to which Canada is a party, or
- (b) any convention, treaty or other international agreement that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved.

To guide him in determining whether this is in fact the case, and amending section 6(8) of the Criminal Code,

(g) a certificate issued by or under the authority of the Secretary of State for External Affairs stating

- (a) that at a certain time any state was engaged in an armed conflict against Canada or was allied with Canada in an armed conflict,
- (b) that at a certain time any convention, treaty or other international agreement was or was not in force and that Canada was a party thereto, or
- (c) that Canada agreed or did not agree to accept and apply the provisions of any convention, treaty or other international agreement in an armed conflict in which Canada was involved,

is admissible in evidence in any proceeding under this Act without proof of the signature or authority of the person appearing to have issued it, and is proof of facts so stated.

This means that any such certificate is to be taken as a statement of law and not of

⁹⁵ *Continental Shelf (Libya/Malta)*, ICJ Reports, 1985, p. 13 at p. 29; see, also, Cheng, *General Principles of Law* (1953), pp. 23-4; Friedmann, 'The Role of "General Principles" in the Development of International Law', *American Journal of International Law*, 57 (1963), p. 279; Green, 'Comparative Law as a "Source" of International Law', *Tulane Law Review*, 42 (1967), p. 52.

fact, although one might question the wisdom of the provision stipulating that the document is to be taken as such, regardless of the character of the signature. The document would have been no less authentic if it had to be proved as properly issued in accordance with the Act.

Within a matter of months of the Bill becoming law, the first charge was brought against Imre Finta, a 76-year old Hungarian, accused of overseeing the confinement and transport of 8,615 European Jews to concentration camps.⁹⁶ Care will have to be taken with regard to the assessing of evidence, particularly that relating to identification, for the accused will have changed noticeably in the more than forty years since his alleged crimes were committed. It will also be necessary to sift the evidence in order to ensure that there is no possibility of his becoming a victim by way of surrogation for other Hungarians who may have committed similar offences. This latter problem is closely related to the danger that the new concept of crimes against humanity will be utilized for any number of vicious atrocities which do not, however, fall within the concept either of war crimes or of crimes against humanity as understood in Canadian law. Thus the fact that a variety of such actions was perpetrated in Europe prior to the outbreak of war or the entry of a particular country into the war does not mean that such acts can be construed as war crimes. Moreover, as has been pointed out, before 1945 there was no way in international law as then understood that a country could be considered as in breach of the law because of the ill-treatment of some of its subjects. The fact that, for example, the Iron Guard in Romania was responsible for perpetrating such atrocities against Romanian Jews does not justify the charging of members of that organization in Canada for crimes against humanity.⁹⁷ In so far as it is alleged that such activities were part of the planning of aggressive war condemned at Nuremberg as a crime, this does not make those responsible liable for war crimes under the definition embodied in the Canadian legislation. In this connection the comment of the Nuremberg Tribunal with regard to the Nazi massacre of German nationals in Germany prior to the outbreak of war becomes of great relevance:⁹⁸

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps, in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and commit-

⁹⁶ *Edmonton Journal*, 21 January 1988. In August 1988 it was announced that a preferred indictment had been signed against Finta, rendering a preliminary hearing unnecessary: *The Globe and Mail*, 23 August 1988.

⁹⁷ *The Globe and Mail* (Toronto), 22 January 1988.

⁹⁸ Loc. cit. above (n. 4), at pp. 65, 249, respectively.

ted after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.

This is tantamount to saying that since, after Romania entered the Second World War as a belligerent, such atrocities continued, it might be possible to argue that such earlier acts by the Iron Guard were part of the *res gestae* and, as such, a part of the waging of aggressive war. They therefore amounted to war crimes—provided Canada accepted the latter as a war crime.

This citation from the *Nuremberg* judgment brings into focus another issue of importance in any Canadian trial of Nazi war crimes or crimes against humanity. There is at present a new revisionist historiography blossoming seeking to whitewash the Nazi era by denying the holocaust and similar atrocities. There is already evidence of this attitude in Canada in the *Keegstra*⁹⁹ and *Zundel*¹⁰⁰ trials. In view of the acceptance of the *Nuremberg* judgment by the world, including Canada which subscribed as part of the United Nations to the institution of the Tribunal, and the acceptance of its findings by both German Republics, together with a whole panoply of war crimes trials from a variety of countries, including Germany,¹⁰¹ it is time the Canadian courts accepted, as has District Court Judge Thomas in the *Zundel* rehearing,¹⁰² the existence of the holocaust and similar events as historic facts, without need of proof or tolerance of doubt. After all, the dead cannot give evidence of their fate in rebuttal! Moreover, in the absence of a peace treaty with Germany, what evidence is there that the War has ended? We only have history books and repute to 'prove' the existence of Napoleon!

It could not have been by oversight that Parliament did not repeal the War Crimes Act when it enacted C-71. This means that we must question the acceptance by the Deschênes Commission of the contention¹⁰³ that the 'Act is essentially an out-dated piece of legislation enacted at another time for another purpose'. Bill C-71 makes provision for trial by Canadian courts in Canada of war crimes and crimes against humanity which might be committed in the future. Should there be a conflict in which Canada is a belligerent, the problem of war crimes trials during hostilities in areas in which Canadian forces are in the field would arise again. In such circumstances military tribunals called upon to try such offenders would, regardless of C-71, operate in accordance with the War Crimes Act.

While a lacuna may have existed in the past, Canada now has two processes to move against those accused of crimes against humanity or war crimes committed during a conflict in which Canada is a belligerent. This could be by way of military

⁹⁹ *R v. Keegstra* (1984), 19 CCC (3d) 254.

¹⁰⁰ *R v. Zundel* (1987), 31 CCC (3d) 97.

¹⁰¹ See text to n. 13, above; *The Times*, 8 January 1962, carried a report of a statement by the Chief Minister of Hessen that, by then, 5372 persons had been tried by the German courts and found guilty of Nazi crimes.

¹⁰² *The Globe and Mail*, 6 February 1988. It was held, however, that the race hatred legislation in the Criminal Code s. 281.2 (2), under which Zundel was charged, was contrary to the Charter of Rights for uncertainty. But this does not affect the significance of Judge Thomas's ruling (which is not affected by the later decision to allow Zundel's appeal on technical grounds). However, it may mean that the provisions regarding the duty of a commander in Articles 86 and 87 of Protocol I, 1977 (Schindler and Toman, op. cit. above (n. 37), p. 621), may equally be held too uncertain to sustain a prosecution for war crimes.

¹⁰³ *Report*, p. 123; see text to nn. 49–50 above.

tribunals under the War Crimes Act during the hostilities or occupation connected therewith, or by the civil courts under the Criminal Code. When peace is restored it would seem that the Criminal Code prevails, just as it is the Criminal Code alone which confers jurisdiction over crimes against humanity committed when Canada is at peace.

REVIEWS OF BOOKS

Droit humanitaire et conflits internes: origines et évolution de la réglementation internationale. By ROSEMARY ABI-SAAB. Geneva and Paris: Institut Henry-Dunant and Éditions Pédone, 1986. vii + 280 pp. 120F.

Since 1945 more people have been killed in civil wars and other internal conflicts than in hostilities between States. This period has, however, also seen the adoption of the only international agreements specifically designed to regulate internal armed conflicts: common Article 3 of the 1949 Geneva Conventions and Additional Protocol II of 1977. Mrs Abi-Saab's book is an examination of the legislative history of those two instruments. In the preface the author disclaims any intention of writing a study of the practice of States or bodies such as the International Committee of the Red Cross in the application of the law in internal conflicts—practice is considered only in so far as it sheds light upon the legislative process. Similarly, the book is not intended as a textbook of the law of internal conflicts. Mrs Abi-Saab is, perhaps, excessively modest on both counts. While the main emphasis is certainly upon the diplomatic process which produced Article 3 and Protocol II, the book is much more than an examination of the debates at two international conferences and contains much of interest in relation to practice and the analysis of the substantive provisions of the two texts.

The first chapter discusses the evolution of legal thought on the regulation of internal conflicts up to the outbreak of the Second World War. Paradoxically, although the first attempt at a systematic code of the laws of armed conflict, the Lieber Code of 1863, was promulgated for use in the American civil war, at the time it stimulated little interest in the possible application of international law to the conduct of hostilities within a State. On the contrary, much of the discussion to which Lieber's Code gave rise emphasized the similarities between the American civil war and wars between States in order to demonstrate that the principles of the Lieber Code were applicable to conflicts of an international character. States tended to assume that internal conflicts were matters which fell outside the scope of international law for most purposes. Initially, at least, the ICRC and the Red Cross movement appears to have shared this view: a proposal by the American Red Cross to develop a body of rules for application in internal armed conflicts made no headway at the International Conference of the Red Cross in 1912. The attitude of the ICRC, however, underwent a considerable change in the next few years as it became involved in numerous internal conflicts such as the fighting in Upper Silesia and the Spanish civil war, with the result that by 1939 the ICRC was actively promoting the idea of an international agreement which would at least give formal recognition to a role which the ICRC had already assumed in practice in many internal conflicts.

Chapter 2 examines the processes which led to the adoption of Article 3 of the 1949 Geneva Conventions. The author shows how Article 3, sometimes described as a miniature convention on internal armed conflicts, came to be adopted after the failure of the Diplomatic Conference to agree upon more ambitious proposals which would have extended the whole of the Geneva Conventions to internal armed conflicts. While recognizing that Article 3 represented a valuable step forward, the author examines some of its weaknesses, in particular its uncertain field of application and lack of detail, in this and the next chapter.

The most important part of the book is Chapters 4 and 5, in which the author considers first the preparation for the Diplomatic Conference of 1974–7 and then the Conference itself. After the experience of 1949, when some of the proposals regarding internal armed conflicts had suffered from inadequate preparation, the ICRC was meticulous in preparing the ground this time. The controversial (and in many respects impractical) ideas about

applying the whole body of the Geneva Conventions to internal conflicts were abandoned in favour of a separate protocol on internal conflicts which would have elaborated and built upon the basic principles in Article 3. When the Diplomatic Conference convened, however, history repeated itself. The ICRC proposals regarding internal conflicts encountered strong opposition from a wide variety of States, many of which doubted the need for any fresh provisions on internal conflicts. Protocol II survived only because of a last minute compromise and only in a seriously attenuated form.

The discussion of why Protocol II encountered such difficulties is perhaps the most interesting part of the book. Undoubtedly one of the reasons was that once Protocol I had been amended to include a provision (Article 1(4)) that wars of national liberation were to be treated as international conflicts to which the Geneva Conventions and Protocol I would apply in their entirety, many of the Third-World States lost interest in the development of the law regarding internal conflicts. Nevertheless, Mrs Abi-Saab suggests that this was by no means the only reason. While further development of the law regulating the conduct of internal armed conflicts might have seemed a logical progression to some older States, to many newly independent States, which had not been represented at the 1949 Conference, though they had subsequently become party to the 1949 Conventions, such a restriction of their sovereignty appeared far less palatable. Mrs Abi-Saab suggests that one problem in this respect was that, because the law of armed conflict applies equally to both parties in a conflict, it appears to confer an enhanced status upon rebels, notwithstanding any provisions to the contrary. States which feared such a result might, she maintains, have been more willing to accept restrictions on their freedom to combat rebellion if those restrictions had been included in a human rights agreement rather than a treaty on the law of armed conflict. Moreover, Mrs Abi-Saab argues that it would be wrong to assume that all the opposition to Draft Protocol II came from the Third-World States — several developed countries were also unenthusiastic about the Draft Protocol.

Although Protocol II as finally adopted was a pale reflection of what might have been, the author none the less welcomes it as embodying a measure of progress. Perhaps the worst result of the truncation of the original draft was that Protocol II was given a very restricted field of application, limited, in effect, to civil wars in which the rebel party controls a substantial area of territory (although it is interesting to note that in the one case in which the principles of Protocol II have been applied, the conflict in El Salvador, this requirement has been given a liberal interpretation). One effect of the restricted field of application of the Protocol is that the uncertainty surrounding the scope of common Article 3, long regarded as a defect in that provision, has become a positive virtue since it can still be argued that Article 3 applies to conflicts which do not reach the high threshold for the application of Protocol II.

There is much in this book to attract anyone with an interest in the legal regulation of internal armed conflicts. Even those already familiar with the debates of 1974-7 are likely to find the historical perspective interesting. The book is a welcome contribution to the literature on a subject of growing importance.

CHRISTOPHER GREENWOOD

Keyguide to Information Sources on the International Protection of Human Rights. By J. A. ANDREWS and W. D. HINES. London: Mansell Publishing Limited, 1987. xiii + 169 pp. £28.

International Enforcement of Human Rights. Edited by R. BERNHARDT and J. A. JOLOWICZ. Berlin: Springer-Verlag, 1987, 265 pp. DM 84.

Human Rights and International Relations. By R. J. VINCENT. Cambridge: Cambridge University Press, 1987. 186 pp. Hardback, £20; paperback, £6.95.

Human Rights in Internal Strife : Their International Protection. By T. MERON. Cambridge: Grotius Publications Ltd., 1987. xiii + 172 pp. £27.
Les Garanties fondamentales de la personne en droit humanitaire et droits de l'homme. By M. EL KOUHENE. Dordrecht, Boston, Lancaster: Martinus Nijhoff, 1986. xxii + 258 pp. £41.75.

Three of these five books on human rights are essentially introductory works. Andrews and Hines' *Keyguide* is the most basic. It is intended to help librarians and students beginning their research on human rights to cope with the constantly growing mass of material on this area. Part I provides a general background to the international protection of human rights. The authors give an outline of the history of the concept of human rights and a short account of their domestic constitutional protection. They describe the continuing controversy over the nature of human rights, the relative importance of economic and social, and civil and political rights, and the emergence of the so-called third generation of human rights (issues central to Vincent's book). On the crucial question of the implementation of human rights (the subject of the collection of papers edited by Bernhardt and Jolowicz) the authors give an inevitably rather impressionistic sketch of procedures under regional and international treaties. Chapter 3 on the structure and substance of human rights protection begins with a useful introduction to some of the concepts essential for any understanding of the operation of human rights: non-discrimination, the obligation of the individual to society, the margin of appreciation of a State. It also contains a discussion of specific human rights. Chapter 4 on human rights organizations is little more than a list and it is not clear that it adds much to the list of selected organizations in Part III. Similarly, the main point of Chapter 5 on the literature of human rights is that it serves as an introduction to Part II.

Part II deals with sources of information. It provides a detailed referencing system to the international source material of human rights: treaties, law reports and other international and regional documentation. It also gives a helpful introduction to the most important periodicals, bibliographies and textbooks on human rights written in English. Finally Part III gives a list of selected organizations concerned with human rights. Any student at the start of her research would find this book very helpful.

Bernhardt and Jolowicz's *International Enforcement of Human Rights* is a collection of reports submitted to the colloquium of the International Association of Legal Science held in Heidelberg in 1985. It concerns legal mechanisms for the enforcement of human rights and does not attempt to cover questions of political mechanisms such as the role of NGOs or the role of human rights in foreign policy.

The chapters on the UN (Henkin), European (Jacobs), American (Buerghenthal) and EEC (Weiler) systems of enforcement all cover familiar ground but they are generally admirably clear and up to date. They provide students with a useful introduction to the question of enforcement, especially as the relevant international instruments are included in an appendix to the text. The sections on Africa and Asia will be less familiar to many readers. The African Charter on Human and Peoples' Rights has only recently entered into force; because it is not always precise and its implementation is at an early stage, much of Mbaya's chapter is inevitably conjectural. He concentrates on the features peculiar to the African Charter that distinguish it from its regional predecessors — the lack of provision for a court, the emphasis on conciliation and on group rather than individual rights. Asia is still a long way from instituting regional mechanisms to implement human rights, and Yamane's chapter is a useful reminder that in Asia and elsewhere many reforms have been made 'under the banner of other concepts and not in the name of human rights'. She asks whether there is a distinctively Asian approach to human rights and suggests this may be found in features such as 'concentration on concrete problems', 'reliance on horizontal solidarity' and 'positive assessment of collective rights'.

The very brief Soviet report by Tumanov is again familiar. His suspicion of international

enforcement, his view that implementation remains an internal affair of the State unless there is a gross violation of human rights endangering world peace and security (an attitude shared by many States outside the Eastern bloc), shows that the Soviet acceptance of the 1966 UN Covenants marked only a limited change of attitude. Enforcement mechanisms going beyond the compulsory reporting system are still not acceptable. This is followed by another very brief chapter in which Partsch challenges some of the common assumptions about human rights. His attack on the concept of 'generations of rights' and his interpretation of 'people's rights' as those of the people of an established State (and not an element in the international protection of human rights) are interesting and provocative but need to be developed at greater length to make clear their relevance to a discussion of the enforcement of human rights.

Vincent's *Human Rights and International Relations* makes greater demands on the student for it covers a very wide range of complex subjects. In the preface Vincent declares his intention 'to bring together in one place an account of the theory of human rights, an examination of the part they play in international relations; and, finally, a view of the part they ought to play'. The first part provides an introduction to some of the fundamental theoretical issues in human rights: the nature of rights, the basis for human rights, what constitutes a human right. It contains a brief history of the idea of human rights in Western thought and an examination of the difficult problem of cultural relativism. In his consideration of the international law of human rights there is apparently some confusion between the enforcement and the existence of human rights. And Vincent argues that the illegality of forcible humanitarian intervention shows 'the weakness of the hold of the international law of human rights' — a very controversial proposition for most international lawyers.

Part 2 deals with human rights in practice. Here Vincent examines East/West and North/South relations in fairly general terms. He is concerned with differences at the theoretical level rather than with the role of human rights in the foreign policy decision-making of particular States. He ends this section with a discussion of institutional protection of human rights at the global, regional and non-governmental levels. It is in this part that Vincent's main theme, the priority and wide scope of the right to life, begins to emerge more clearly. He argues that the right to life includes the right to subsistence, that it 'has as much to do with keeping people alive as with protecting them against violent death'.

In Part 3 he develops this argument. This part concerns 'what ought to be done about human rights in international relations'. He considers the impact of the development of human rights on international relations and asks whether it is still possible to speak of a community of States or whether this has now been replaced by a 'cosmopolitan community of individuals'. His final chapter argues persuasively that foreign ministries no longer have a choice about the inclusion of human rights, that they are now obliged to pay attention to human rights like it or not. He suggests that States should concentrate on basic needs, especially the right to subsistence, as a way to avoid ideological splits over human rights. Unfortunately space does not allow him to examine fully the enormous practical problems of the implementation of this policy. Similarly, and because Vincent covers such a lot of ground, it is sometimes not easy to distinguish Vincent's own arguments from those of others. But there is much here of interest for a student of human rights.

The last two books are the most specialized and hence the most interesting. Meron (with the aid of research assistants) and El Kouhene deal with the same topic, the relation between humanitarian law and the law of human rights, and much of the substance of these books is virtually identical. El Kouhene's work is the longer and more detailed and contains an index and bibliography; Meron's is rather more theoretical, and there are some differences of emphasis between the two.

They both describe the growing convergence of humanitarian law and human rights after the Second World War; they both discuss the people protected and the extent of the rights involved. El Kouhene goes into rather more detail on the drafting history of the relevant treaties. They both identify the problem that those rights from which no derogation is permitted in time of emergency are more limited than the humanitarian protection offered by

the Geneva Conventions; El Kouhene provides a useful table for comparison. Meron, however, lays more stress on this problem. For him the protection of the right to due process is crucial and the failure of human rights treaties to protect this in times of internal unrest is a major weakness. In contrast, El Kouhene tends to stress the convergence between the rights protected by humanitarian conventions and the non-derogable rights under human rights treaties. He regards the right to due process as *jus cogens* (though with very little argument on this controversial point) and thus as protected even in the absence of treaty provision.

Meron is the more concerned with the question of internal strife, with its definition and the legal basis for the role of the ICRC in such situations. He discusses previous attempts to deal with the gap he perceives in the treaty protection of human rights. Both he and El Kouhene agree that it would be desirable to produce a Declaration on Fundamental Norms in Internal Strife, but for El Kouhene this is a brief suggestion whereas for Meron it is the central theme of his book. But there are obvious difficulties with this proposal. The reluctance of States to acknowledge the applicability of common Article 3 of the Geneva Conventions and their insistence on a narrow interpretation of 'non-international armed conflicts' in Protocol II do not encourage optimism about their political will to accept even the limited commitment of a declaration on internal strife. El Kouhene's final chapter covers the implementation of humanitarian and human rights law. Meron regards this as unnecessary as there is already much written on this subject. These are both interesting and well written books. Specialists in this area will have to read both; for others it would be enough to read the book in the language more familiar to them.

CHRISTINE GRAY

World Politics and International Law. By FRANCIS ANTONY BOYLE. Durham: Duke University Press, 1985. x + 366 pp. + index. Hardback, \$32.50; paperback, \$14.75.

International lawyers in the United States have been put on the defensive during the past eight years. So-called political realism seems to have pushed aside legal considerations in the renewed era of foreign policy defined in terms of national interest. The confusing and conflicting justifications of the Grenada invasion, the rejection of the ICJ's ruling in the *Nicaragua* case and the innovative interpretation of the ABM Treaty by the US administration are just some of the examples which contributed to a certain feeling of irrelevance, as far as international law was concerned.

Francis Boyle's book, which is little known in Britain, although it has earned high praise in North America, was conceived in this climate. It is a plea for the inclusion of international law in the process of foreign policy formulation, especially in the US. During the current phase of political change-over in the US his essay gains renewed relevance.

The author begins with an explanation of the scepticism with respect to international law which appears to be widespread among the current generation of American political decision-makers. Many of them, it seems, link international law to the kind of idealistic moralism which was so thoroughly discredited at the end of the Second World War. Boyle finds it ironic that in reality international lawyers are mostly operating in a positivist framework, which would actually be quite appropriate for the pursuit of national interests through the use of law.

After a brief survey of the development of positivism and international law since the nineteenth century, the author turns to more modern questions. He rejects the jurisprudence of McDougal and associates as a potential synthesis of political science and international law which could overcome the gap between the lawyers and the statesmen. Like many others, he detects a naturalistic and ' . . . uncanny ability to justify in pseudo-legal terms whatever course of behaviour the US government deems expedient . . . ' in the propositions put forward by the defenders of the Yale approach (p. 66).

In Part Two of the book, Boyle analyzes the role of international law during and after the

Entebbe incident. His aim is to demonstrate that international law is of relevance even in times of crisis and even to a State as politically isolated as Israel. This he does quite satisfactorily, but he then proceeds to extrapolate rather sweeping generalizations from his brief analysis of the Entebbe incident and the subsequent proceedings in the organs of the United Nations. He himself admits, however, to the tentative nature of his conclusions. His dynamic and rather fluid definition of what constitutes permissible State behaviour in times of crisis will undoubtedly prove challenging to a great many writers in the field.

Many scholars will also find the last part of the essay very thought-provoking. Boyle analyses US foreign policy fiascos since the Tehran hostages crisis. He links failure to the lack of legal considerations in the operational management of policy. In his rushed legal analysis of recent US actions involving the limitation of armaments or the application of force, he seldom finds much justification for Washington's performance over the past decade. His very strong language in chastising the Reagan administration ('... a group of men and women who were elementally [*sic*] lawless and thoroughly Machiavellian in their perception of international relations and in their conduct of foreign affairs') smacks of ideology and unfortunately detracts a bit from the valid points he has to make (p. 290).

In sum, Boyle presents a highly interesting and sometimes challenging attempt to re-introduce an awareness of international law into the planning and execution of international politics. The review of US operations in Part Three of the book could, however, have benefited from more analytical depth and less of an exhibition of certitude on the basis of conviction, well founded though it may be.

MARC M. WELLER

System of the Law of Nations. State Responsibility, Part 1. By IAN BROWNLIE. Oxford: Oxford University Press, 1983. xii + 240 pp. + appendices. £25.

This is designed as the first of a two-volume work on State responsibility, the present volume being concerned with the basic principles of State responsibility and the second with circumstances precluding wrongfulness. Its format is somewhat reminiscent of McNair's works, with extensive use of long citations from diplomatic correspondence, arbitral awards and the like. One suspects this is a quite deliberate choice, designed to move the reader away from the excessive conceptualization which was characteristic of some of the ILC reports, and to re-assert the need to examine what actually happens. At the same time, the work is very much an intellectual inquiry, in which the author scrutinizes some of the notions currently in vogue in the ILC, often with results that do not flatter the Commission.

Thus, in a third Chapter on the nature of State responsibility he doubts the existence, or utility, of a category of 'international crime'. This scepticism is to be welcomed at a time when, in United Nations bodies, a great deal of time and effort is spent on the concept of crimes of State, with little or no possibility of any practical application.

In Chapter Four, on the conceptual foundations of responsibility, he is equally scathing about the utility of the notion of 'imputability', finding it superfluous. Again, this may be right provided one is clear that the State bears no general responsibility for acts of private persons within its jurisdiction, as he later points out (and he is certainly right to reject Oppenheim's use of the notion of vicarious responsibility in this context). What one does need are rules on responsibility for *ultra vires* acts and about the nature of the obligations owed to foreign States and aliens. For example, the precise obligations of national tribunals are by no means clear, and the concept of a 'denial of justice' states the problem rather than solves it.

Professor Brownlie accepts that responsibility is objective, flowing from the result produced rather than the state of mind of the actor. Not surprisingly, therefore, he is highly sceptical about 'fault' liability (pp. 43-6); but the further comment that 'the issue becomes

one of causation' needs some elaboration. Prima facie one has to identify the act of the State which is alleged to ground responsibility, and then to establish a causal relationship with the damage complained of: but whether the act is a breach of duty (because done without due diligence) or not looks like a separate question. However, he is certainly right to stress the individuality of issues. Few cases can be resolved by simple reliance on abstract propositions, as the more recent decisions of the US/Iran Claims Tribunal (not available to the author at the time of publication in 1983) will illustrate.

The author is quite scathing about the ILC's attempt to generalize the topic of liability for 'lawful' acts (pp. 49–50). In this the present reviewer would agree. What is needed is simply to identify those few categories of State conduct (such as search under Article 22 of the High Seas Convention, lawful nationalizations, acts of necessity, space exploration, etc.) where there is a concomitant obligation to pay compensation.

Chapter Five deals with causes of action, and the point made is that, in a great number of contexts, it is essential to identify the cause of action. Professor Brownlie identifies some twenty-five different causes of action for which there is authority in the jurisprudence. Yet he does not suggest that international law recognizes only a finite list; on the contrary, he notes that tribunals require only that illegal acts are clearly identified (p. 84). This being so, it is not easy to see what purpose is served by identifying some twelve 'fundamental' causes of action (p. 85).

Chapter Six illustrates, by citation of actual diplomatic correspondence, the process of protest and claim, and also includes some examples of claims settlement agreements. Unhappily, a reference to the US/Iran Claims Tribunal's recent jurisprudence does not entirely support the author, for that Tribunal has been singularly unimpressed by such agreements as evidence of the substantive law on compensation (and for reasons which this reviewer finds unconvincing). There is a concluding section citing a number of UN resolutions in which a view has been expressed about various international claims.

Chapter Seven covers responsibility for acts of State officials and organs, identifying the different categories involved and generally accepting the approach in Ago's Third Report except for the wording of Article 10 (*ultra vires* acts), labelled as 'imprecise'. The section on 'The Judiciary' is disappointingly brief, for there is relatively little about the content of the conduct required. It is true that the *Sunday Times* case is cited, but that turns on Article 10 of the European Convention on Human Rights, and tells us little about the general international law standard.

Chapter Eight deals with responsibility for the acts of private persons. Professor Brownlie rightly rejects any responsibility for the acts as such, and he deplores categorization by reference to the group concerned (mob violence, for example). Instead, he concentrates on the type of situation giving rise to liability, such as admission of liability, express approval, adoption, etc. He disapproves entirely of the concept in Article 11, para. 2, of the ILC draft articles (attribution of acts of State), calling it esoteric and irrelevant.

Chapter Nine is a correct, and orthodox, account of responsibility in cases of insurrection and civil war (but, again, devoid of illustration from cases before the US/Iran Claims Tribunal, where the issue has had some importance). However, Chapter Ten deals with a theoretically more challenging area, that of physical control as an element of liability when harm is caused outside a State's territory. But the purpose of the Chapter is not to expound principles, but only to illustrate that responsibility is not co-extensive with territory: perhaps for this reason the expected material on trans-boundary pollution is not to be found.

After two further short chapters on Joint Responsibility and Acts having a Continuing Character, Chapter Thirteen deals with Reparation, or remedies. The section on Declaratory Judgments has a long citation from the dissent in *Nuclear Tests*, but without further comment (which we can presume to indicate agreement). On Restitution, Professor Brownlie highlights the disagreement between Lagergren (*BP v. Libya*) and Dupuy (*Topco*) but, in a conclusion which is eminently realistic, sides with Lagergren at least in the context of concession agreements, largely for reasons of practicality. The section on Compensation is

reasonably brief, making certain observations of principle rather than providing a comprehensive exposition, but the emphasis upon *causation* is very timely. The section on Interest is also brief. It does not touch the controversial issue of *compound* interest, nor the curious award in *Aminoil* of interest plus an 'inflation factor' (which to this reviewer looks like interest yet again). And, finally, Professor Brownlie tackles the controversial question whether a State can claim compensation for a direct injury (as opposed to an injury via its nationals). Here he is surely right (and Parry wrong). There is no reason in principle why compensation should not be claimed for damage suffered, and the diplomatic record supports this.

In sum, therefore, this is a book full of sound judgment and valuable insight. It is not easy reading, perhaps because of its format and the use of long citations, interspersed amongst the text. Thus one has the sense of taking in a series of propositions—all of them sound and persuasive—rather than following a detailed exposition of a topic. In large part, of course, the problem arises from the topic itself; it is so large a topic that a systematic and conventional treatment within one volume is an impossibility. But this is a volume which stands as an important adjunct, if not corrective, to the voluminous output of the ILC, and it is clearly an important publication.

D. W. BOWETT

The North Atlantic Assembly. By CHRISTIAN BRUMTER. Dordrecht: Martinus Nijhoff, 1986. xi + 223 pp. £31.95; \$49.50.

NATO's parliamentary conference, the North Atlantic Assembly (NAA), exists in a state of institutional ambiguity. It is not founded on any sort of constitutional treaty and functions without a clearly established mandate. Yet the NAA maintains a permanent Secretariat, administers an annual budget and has quite detailed rules spelling out its structure, composition and procedure. In short, the Assembly would make a very interesting subject for a study on international personality.

Christian Brumter, however, avoids the more theoretical issues raised by the unclear status of the Assembly. Instead, he provides us with an elaborate description of the NAA's organization and of the actual work it has performed so far.

The author begins with a historical overview of the failed attempts to clarify the institutional foundation and mandate of the Assembly. He then discusses the links which formally and informally connect the NAA with the organs of NATO proper and with individual member governments. Characteristically, Brumter does not probe into the question of whether and how these functional links may have influenced or even solidified the status of the organization. Still, he calls the Assembly a "semi-official" international organization' (p. 26), without giving any hint as to why he chooses that particular term of art.

In the following chapters we are introduced to the procedures used by the individual member States to nominate delegates. Brumter even provides the reader with the respective national rates of attendance of Assembly meetings. Next he covers the structure and function of the Assembly's organs, as well as questions of procedure.

In Part II of the book the author surveys the activities of the NAA up to 1985. The discussion of findings and deliberations of the Assembly is clearly organized and the research effort which has gone into this over 100-page long presentation is quite impressive. However, Brumter once again fails to follow up his own work, and leaves us without an analysis of what consequences the activities of the Assembly have had for NATO. He simply asserts that the Assembly has covered a wide range of issues, and that its pronouncements have become less consistent over the years.

In his final conclusions Brumter is no more specific. To his mind, it is up to NATO to make more use of the NAA, but he does not really offer suggestions on how this should be done.

In sum, the book is a nicely crafted introduction to nuts and bolts questions concerning

the NAA, but not much more than that. The author does not take advantage of his own research and gives no evidence of an attempt to rise above the level of description into the realm of analysis. In that way, his book is perhaps somewhat plagued by a problem some observers also see in the work of North Atlantic Assembly itself: its relevance is not immediately obvious.

MARC M. WELLER

The Rights of Peoples. Edited by JAMES CRAWFORD. Oxford: Clarendon Press, 1988. x + 236 pp. £25.

There can be little doubt that the bastion of State-based international law is currently under siege by the scatter-guns of jurists proclaiming international rights enforceable against those States. The collection of essays in this book does much to show why the bastion is becoming increasingly difficult to defend.

It is claimed that collective rights, or the rights of peoples, form a 'third generation' of human rights, after civil and political rights and economic and social rights. This book concentrates on the rights of self-determination, development and culture, and of indigenous peoples, particularly on the extent to which these rights conflict with individual human rights and with the government of States. Each of the contributors struggles to define the scope of these rights, let alone the 'peoples' to whom they refer. This is justified by Crawford, when he declares that 'no one now objects to the category "human rights" [as part of international law] on the ground that the level of actual protection of those rights in many countries remains problematic, that the machinery for their protection in most cases remains embryonic, or that there are still important areas of uncertainty about the content and application of those rights'. This premiss highlights one of the main difficulties facing those seeking acceptance of these rights in the international community, and prompts Brownlie to call for a form of quality control on new human rights.

Both Nettheim, in his excellent examination of the rights of indigenous peoples (particularly in Australia and Canada), and Trigg, in her clear analysis of the conflict between rights of peoples and individual human rights, are able to show that, in general, rights of peoples depend upon and complement individual rights. However, they demonstrate that the legal framework on which these rights of peoples are claimed is not yet flexible enough to accord them consistent enforcement. The well-researched study of cultural rights by Prott accepts that many rights of peoples cannot yet fit into a strict legal formula, but she adeptly states that '[i]f States will not utilize the existing techniques of formulating new, conceptually satisfactory, and practically effective rules to control a serious source of international friction, one can hardly blame those who seek to use techniques which may be conceptually unsatisfactory but do make use of an existing strong ideological commitment, to achieve their ends'.

This statement summarizes the approach of most of the contributors. Where the contributors attempt to justify rights of peoples within a State-based international law system their studies are disappointing, in that they seek to apply imprecise declarations of a non-legally binding character upon the very governments against which the rights are asserted. However, Falk, Kamenka and Crawford show that there must be a conflict between the rights of peoples and the governments of States, as the State is supposedly the representative of peoples under international law, and therefore rights of peoples cannot be asserted without the States' consent. These contributors do much to further the development of the rights of peoples as moral, political, economic and social obligations upon States.

This book is also valuable for its thorough bibliography and collection of documents. Indeed, if the bastion of State-based international law is breached, then this book will be a necessary implement in the evaluation of the rights of peoples in international law.

ROBERT MCCORQUODALE

Antarctica: The Next Decade. Report of a Study Group of the DAVID DAVIES MEMORIAL INSTITUTE OF INTERNATIONAL STUDIES. Cambridge: Cambridge University Press, 1987. xii + 164 pp. £25; \$44.50.

In 1985 the David Davies Memorial Institute of International Studies set up a study group of experts from various disciplines to look at the principal legal, political and scientific issues regarding Antarctica's future. This book is the product of their work.

The question of sovereignty over the 'ice territory' of the Antarctic has always been a potential source of international conflict. The Antarctic Treaty of 1959 ended a period of tension in the region by 'freezing' all territorial claims and by ensuring that the continent would be used for peaceful purposes only. Through the years the Consultative Parties have completed the Antarctic Treaty system by adopting a number of recommendations and two treaties (the Convention for the Conservation of Antarctic Seals of 1 June 1972 and the Convention for the Conservation of Antarctic Marine Living Resource of 20 May 1980) dealing with a variety of issues such as the conservation of Antarctica's living resources and the protection of the environment. *Antarctica: The Next Decade* comes out at a time when the existing regime is under pressure to change.

Since 1982 a group of Third-World States led by Malaysia have been challenging the Antarctic Treaty in the United Nations. The developing countries find the existing regime too exclusive: in order to become a consultative Party and thus acquire considerable decision-making powers under the treaty, a State must demonstrate an interest in Antarctica 'by conducting substantial scientific research activity there' (Article IX of the 1959 Antarctic Treaty). Most developing countries, unable to fulfil this requirement and concerned with the prospect, however remote, of resource exploitation in the area, advocate that the principle of the 'common heritage of mankind', initially developed in relation to the deep seabed, should be applied to Antarctica.

The Antarctic Treaty allows for review after 1991 (Article XII). It remains in the realm of speculation whether the Consultative Parties, some of which are Third-World States, will avail themselves of this opportunity. Until now the tendency has been to accommodate any required changes within the existing framework without calling the basic treaty arrangements into question.

The same method was followed with respect to the exploitation of Antarctica's mineral resources, an issue which is not regulated by the 1959 Treaty. On 2 June 1988, after six years of negotiations, the Antarctic Treaty members finally agreed on a convention that allows mineral mining on the continent and in its coastal waters (*The Times*, 3 June 1988, p. 12). The convention requires several stages of approval, including a consensus decision by a twenty-nation committee before an area is opened to development.

In view of these challenges to the Antarctic Treaty system, *Antarctica: The Next Decade* is appropriately future-orientated. It concentrates on the perceived need to adapt the regime to new circumstances and it critically evaluates the alternative ways in which this can be done. The book is divided into three parts. Part I examines the different viewpoints emerging from the Antarctica debate: the case for continuation of the existing regime, which the Antarctic Treaty participants advocate; the Third-World countries' claim to increased participation in a more universal system; and the conservationist concerns of non-governmental organizations such as Greenpeace International. Part II deals with the political and scientific considerations relevant to the issues of scientific research, exploitation of living and mineral resources and demilitarization in Antarctica. Part III builds on the conclusions reached in earlier chapters in order to formulate recommendations for the future. The book adopts a conciliatory approach. It suggests that informal negotiations should be opened between all interested parties with a view to enlarging participation in the present Antarctic treaty regime. At the same time it dismisses as unrealistic in existing circumstances the idea of a new regime based on the principle of the 'common heritage of mankind'.

The book is a very lucid and informative study of the complicated and multi-faceted problems of the Antarctic, which successfully combines scientific facts with political and legal

considerations. A certain degree of repetition is unavoidable due to the interdisciplinary examination of the questions involved. On the whole *Antarctica: The Next Decade* is, however, a useful and authoritative treatment of Antarctica's development into an area of international concern.

The recent conclusion of the negotiations on a new Antarctic minerals regime does not diminish the value of the book. When the new convention enters into force, it will be legally binding only on those States which become parties to it. Its general influence will depend, among other things, on how effectively its participants will be able to meet demands coming from the rest of the international community. It is worth noting in this respect that Greenpeace has already expressed its dissatisfaction with the solutions agreed upon by the treaty members and that the general issue of participation in the decision-making process established by the Antarctic Treaty is still open. In this light the suggestions contained in the book remain pertinent and they can be useful to all those interested in gaining an insight into the problems of the Antarctic.

ATHANASSIA KONTOU

Les Droits de l'homme à l'épreuve des circonstances exceptionnelles. Étude sur l'article 15 de la Convention européenne des droits de l'homme. By RUSEN ERGEC. Éditions Bruylant; Éditions de l'Université de Bruxelles, 1987. xv + 427 pp. Bfr. 2689.

Although discussion on states of emergency and derogation from human rights norms tends to concentrate on the avoidance of abuse, Ergec begins his book on an upbeat note by pointing out the need, indeed inevitability, of a derogation clause. He traces the origins of the inclusion of Article 15 in the European Convention and then argues that Article 15 corresponds to a state of necessity found in all European countries which provide for states of emergency or siege. The purpose of such necessity, he underlines, is to preserve a state's democratic system and is therefore of value. The majority of the book is devoted to an intensive study of the interpretation of Article 15 and of non-derogable rights, including the famous notion the 'margin of appreciation'. After looking at the major methods of interpretation used by the Commission and Court, the author studies the meaning of 'war', 'public emergency threatening the life of the nation', 'to the extent strictly required by the exigencies of the situation', and 'not inconsistent with other obligations under international law'. The author uses for this study not only case law under Article 15 as such, but also case law under other articles, especially Articles 8–11, literature on the subject and derogation clauses in other human rights instruments. A possible short-coming in his approach, however, is that he conducts his analysis and makes assertions as to the proper meaning of certain terms normally by only referring to his sources in the footnotes, rather than discussing them in the text itself. In this way, he does not distinguish between the value of a judgment on the question itself, an *obiter dictum*, an analogy or statements in literature. Certain arguments, particularly in relation to 'other obligations under international law', seem a little far-fetched, for example, his assertion that a right to appeal should not be derogated from, by arguing that this right can be inferred from Article 6(3) of Protocol II of 1977 additional to the Geneva Conventions 1949 for the protection of victims of internal armed conflicts. First of all this Protocol only applies to certain internal armed conflicts and secondly, the ICRC commentary to the relevant article makes it quite clear that a right of appeal is not included. Thirdly, one cannot infer such a right within Article 6 of the Convention, the Court having excluded this in the *Delcourt* case. On the other hand, the author may have unnecessarily limited himself as far as other human rights instruments are concerned as 'other obligations' could also cover treaties on one right, e.g. the Convention on the Elimination of All Forms of Racial Discrimination, 1966, which contains no derogation clause. In the same section, the author discusses *jus cogens* and international customary law. He equates the former with obligations *erga omnes*, without first asking whether these two notions are in fact identical.

Such a discussion would have been interesting. The problem with *jus cogens* is that it has become very fashionable as a subject of human rights discussion and yet there is no international case law on the subject. One could argue, of course, that this merely proves its success, namely, that no States have tried to conclude treaties which would offend peremptory norms. However, with the difficulty that human rights norms face in State practice, it is a good achievement to illustrate that certain norms have the status of international customary law without feeling the need to prove that they are peremptory norms.

In the author's study of non-derogable rights, he not only reviews the case law and literature of those stated to be non-derogable, but also poses the question of what other norms should be in practice non-derogable. Of particular interest is his proposition that the principle of proportionality—'to the extent strictly required by the exigencies of situation'—means that a State cannot simply render other 'derogable' rights devoid of all meaning. In particular, Articles 5 and 6 cannot be entirely eliminated as this would create a situation whereby non-derogable articles would probably not be respected. This reviewer certainly sympathizes with this view, and indeed the UN's present study on incommunicado detention certainly shows the danger of unlimited power to restrict individuals' liberty. As the author pointed out, this approach is supported by the Court in the *Lawless* case, when it carefully studied the guarantees provided by the government when authorizing administrative detention. This has since also been supported by the Inter-American Court of Human Rights in its advisory opinion in 1987, by stating that *habeas corpus* cannot be suspended in an emergency situation as it is 'essential for the protection of the rights and freedoms whose suspension Article 27(2) prohibits'.

The last part of the book studies the supervisory mechanisms provided for in the European Convention and some of their shortcomings. The author argues in favour of a larger role for the Secretary-General to prevent the abuse of Article 15 and to eliminate some of the delay associated with the usual procedure. Finally, the book contains an extensive and useful bibliography (but unfortunately, the reference to Bin Cheng is throughout misspelled).

In conclusion, although an English reader may find the language rather tortuous at times and the style rather theoretical and long, the book is well-researched, provides a thorough analysis of all aspects relevant to Article 15 and contains some interesting insights.

LOUISE DOSWALD-BECK

Judicial Remedies in International Law. By CHRISTINE GRAY. Oxford: Clarendon Press, 1987. xix + 250 pp. £27.50.

International law textbooks rarely devote more than a few pages, if that, to the question of reparations and yet a practising lawyer in domestic law would consider this area of law paramount: any client would want to know, when deciding whether it is worth his while bringing a claim, precisely what kind of court order or damages he is likely to get if successful. Christine Gray, having set herself the task of bridging this gap in international law literature, has undertaken an admirable and thorough research of the awards granted in international tribunals. Awards granted by arbitral tribunals and the International Court of Justice (including its predecessor) are studied, and are then compared with those of the European Court of Justice, the European and American Courts of Human Rights, international administrative tribunals, national claims commissions and international commercial arbitration.

The results of all this research read somewhat differently from the frequently-quoted *Chorzów Factory* case, where it was held that it is a basic principle of international law that a violation of that law involves an obligation to make reparation and that such reparation 'must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'. Far from providing detailed examples of these principles, practice appears to indicate that tribunals seldom order the violating State to make reparation. Orders of restitution and specific performance are truly exceptional and even damages are not as automatically

granted as might be thought from the theory on the subject. The award of damages is more commonly seen in specialized tribunals hearing expropriation cases, but even here it is not always evident what yardsticks are actually used in lawful or unlawful expropriations, and the principle of compensation itself is now subject to doubt with changes of perception on the exploitation of national resources. The PCIJ and the ICJ only actually awarded damages in *The Wimbledon* and the *Corfu Channel* case respectively, and the European Court of Human Rights has done so on several occasions in an unpredictable way, apparently 'for what it regards as serious breaches or for victims with whom it sympathizes' (p. 156). Not only do international tribunals seldom refer to the case law on reparation of other tribunals, but even their own previous practice is rarely alluded to. This means that tribunals in effect act in isolation so that awards granted seem arbitrary and inconducive to legal predictability. The most common award is therefore the declaratory judgment (unless the Court refuses to do even this as being contrary to 'judicial propriety'). Ms Gray also sees the advisory opinions of the ICJ as being, in effect, a means of obtaining a declaratory judgment in cases where the court would not have the jurisdiction to give a declaratory judgment in a contentious case.

In the face of this reticence to give orders of restitution, specific performance or even damages, the author questions whether the declaratory judgment is not, after all, the better means of dispute settlement in international relations. She refers, in particular, to the successful record of the European Court of Justice which limits itself to giving declaratory judgments under Articles 169 and 170 of the Treaty of Rome. She also refers to a number of new treaties on the environment which work towards co-operation rather than establishment of responsibility and reparation. This reviewer would agree that there is a good case for arguing that it is better for a small community to enforce its norms through reaffirmation and co-operation, rather than by sanctions, and for this purpose the community of States in the world is indeed a small one. Early arbitral tribunals and later the World Court naturally followed the basic principle of municipal law that a breach of law occasions the duty to make reparation. Beyond this principle, however, not much else remains of municipal practice in international tribunals, and perhaps this indicates that it is in fact unsuitable in international relations. One cannot imagine, however, the principle being abandoned altogether. This could, in particular, remove one psychological element of the binding nature of the law, namely, the sanctions foreseen for violations, even if such sanctions in practice consist more of adverse publicity and injury to reputation than restitution or the payment of damages. In particular, it would appear to this reviewer that a more coherent policy is called for in the European Court of Human Rights as the individuals concerned are not analogous to a State in a small community, where co-operation is to be encouraged, but rather victims of a violation of a law in a municipal law-type situation.

Finally, Ms Gray looks at alternatives to the traditional finding of responsibility and granting of judicial awards, in particular, the shaming of delinquent States in international organizations, the use of municipal law remedies to enforce a treaty and the provision of reparation for injuries caused by lawful activities. In this way she completes her thoughtful analysis on the consequences of a breach of international law and has provided an instructive and thought-provoking work on a too-often neglected but important area of international law.

LOUISE DOSWALD-BECK

Constraints on the Waging of War. By FRITS KALSHOVEN. Geneva: International Committee of the Red Cross, 1987. xiv + 175 pp. Swiss Francs 12.

Handbook on the Law of War for Armed Forces. By FREDERIC DE MULINEN. Geneva: International Committee of the Red Cross, 1987. xxiv + 232 + (appendices) 24 pp.

Index of International Humanitarian Law. By WALDEMAR SOLF and J. ASHLEY ROACH. Geneva: International Committee of the Red Cross, 1987. xxvi + 284 pp.

The International Committee of the Red Cross has recently published three very different books on the law of armed conflict, each of which is a useful addition to the literature on this subject.

Constraints on the Waging of War is a short and readable survey of the law of armed conflict, which is likely to be particularly valuable as an introductory work for students, although many others will also find it interesting. The book opens with two excellent chapters which discuss the history of the law of armed conflict and consider some of the most common objections, such as that law cannot be effective in war and that attempts to regulate the conduct of war merely make war more acceptable. Chapter 3 then examines the main principles of the law as it stood prior to the adoption of the 1977 Protocols additional to the Geneva Conventions of 1949. The changes introduced by the 1977 Protocols are considered in Chapter 4, while Chapter 5 discusses the 1980 Weapons Convention. This approach has its disadvantages since it means that the discussion of some topics, such as reprisals, protection of civilians or combatant status, is divided between two chapters. Nevertheless, since less than half of the States which are parties to the Geneva Conventions have so far become parties to the 1977 Protocols or the Weapons Convention, the author was probably right to treat the new law separately rather than to give the impression that all of the rules which he discusses are of almost universal applicability.

Although the length of the book does not permit the author to discuss problems in any detail, the treatment is concise rather than superficial and he does not shy away from controversial questions such as the legality of nuclear weapons or reprisals against an enemy's civilian population. The only slight regret to which this reviewer must admit is that more was not made of some of the cases which illustrate the application (or otherwise) of the law of armed conflict. Yet in view of the amount which the author has packed into such a short space, while still retaining a readable and interesting style, it would be wrong to make this a point of criticism.

The *Handbook on the Law of War for Armed Forces* is aimed at a very different audience from that addressed by Professor Kalshoven. Colonel de Mulinen, of the Swiss Army, has set out to write a practical handbook which can be used for training and as a code of conduct in armed forces. The structure of the book is based on lectures given at the International Institute of Humanitarian Law's course for officers and emphasizes the chain of command responsibility, being divided into chapters on responsibility at strategic level, through tactical command to the conduct of battlefield operations, rather than into the traditional subjects (although belligerent occupation and neutrality are treated in separate chapters at the end of the work). The style is terse and practical rather than discursive, setting out in point form the legal considerations which officers at various stages in the chain of command will need to take into account. This style, together with the fact that the book has been translated from French and in places reads somewhat awkwardly, makes the *Handbook* more of a work of reference than a textbook. To those outside the armed forces its main interest lies in the attempt to translate the principles of the law into practical instructions. In this respect it is particularly interesting at a time when most States are in the process of revising their military manuals to take account of developments in the law.

The *Index of International Humanitarian Law* is a reference work certain to be widely used by anyone engaged in research in this field. Based upon an earlier work by Jiri Toman, the *Index* is arranged in tabular form and shows the reader where to look in the Hague Conventions of 1907, the 1949 Geneva Conventions and the 1977 Protocols for the provisions dealing with a wide range of topics from Abandonment to Zones. Since the law governing many of these questions is scattered amongst several treaties, it is all too easy to overlook the provisions of one agreement by concentrating upon another. Professor Solf (who died while the book was in press) and Captain Roach deserve the gratitude of all those who need to track down the law on any aspect of armed conflict for their labours in building up this index.

CHRISTOPHER GREENWOOD

The Law of the Sea and Maritime Boundary Delimitation in South-East Asia. By KRIANGSAK KITTICHAISAREE. Oxford: University Press, 1987. xv + 209 pp. £22.80.

This is a modest, but useful, book stemming from a Ph.D thesis. It covers baselines, 'lines of allocation', the territorial sea, the continental shelf, the exclusive economic zone, islands, archipelagos and finally, in Chapter 10, the problems of semi-enclosed seas in south-east Asia. There are also ten useful appendices.

The advantage of the book lies in the fact that the author has produced details of State practice in the area not generally available. There are a few errors. For example, the UK Orders-in-Council of 1954 did not define the lateral boundaries of Brunei, but rather those of the adjoining territories of North-Borneo and Sarawak (p. 67).

The integration of the case law into the analysis of the various problems is sound and perceptive. He rightly notes the virtual abandonment of 'natural prolongation', in the physical sense, within 200 miles of a State's coast, following the 1985 judgment of the ICJ. In fact he treats the Court's judgments with almost excessive deference. But there is enough evidence of originality. He raises the question, which this reviewer had not seen raised before, of what happens to Cambodia's maritime zones, given that, because of Vietnam's military occupation, neighbouring States are not prepared to enter into delimitation agreements with Cambodia. He suggests a sort of 'trust' for Cambodia (p. 108), although he recognizes the difficulty that there is no organ presently able to act as a supervisory body.

As regards delimitation of the EEZ, the author's views on the effect of the *Gulf of Maine* judgment are unclear. Of course, the crucial question is whether the Chamber was right to base the delimitation on 'neutral' factors in a single maritime boundary, thus excluding the economic factor of relative dependency on the fisheries in question, and whether this same elimination of economic factors would be justified in a purely EEZ delimitation. He seems to applaud Judge Gros' dissent, and even suggests that the Chamber gave 'preferential treatment to the fisheries factors' (p. 133), although this is by no means apparent in the judgment.

There are two fairly straightforward chapters on Islands and Archipelagos, and then a final chapter on Semi-Enclosed Seas. What emerges from this is that, in the South China Sea, the coastal States have no common interest, but rather conflicting interests, so that the necessary co-operation and flexibility will be very hard to achieve.

D. W. BOWETT

International Law. By N.A. MARYAN GREEN. 3rd edition. London: Pitman Publishing, 1987. xxlviii + 333 pp. £25.

The third edition of this textbook retains most of its original features, in particular, its conciseness, its many clear headings and its readability which renders it an easily usable

guide to those unversed in international law. It is especially suitable as a first step for practitioners and those wishing to know how certain affairs are in fact handled in international relations. It explains clearly, for example, the meaning of sovereignty and personality, and the practice of certain institutions such as the International Law Commission, diplomatic and consular practice and matters related to nationality. International institutions are also well treated, with various features common to all of them being studied, rather than the usual examination of the United Nations with a cursory mention of other institutions.

On the other hand, this reviewer would be wary of recommending this book as a student's principal textbook, or its being used as a final answer to a problem which a practitioner is dealing with. The reason for this is that the book frequently omits to mention the controversial aspects of many issues, or the very different complexion that international law has taken in the last forty years. In particular, the subject of human rights is dealt with in only eleven pages, two of which are devoted to self-determination, and humanitarian law is described in a few lines. The treatment of some areas is also at times more simplistic than necessary, even in a short general textbook. For example, the author's explanation of customary law, with his emphatic reliance on physical State practice, does not even mention the different possible ways of looking at *opinio juris* or that divergent theories exist. In some places, assertions are made which could be very misleading, for example, on p. 103: '*while a state may treat its nationals at pleasure*, the same does not apply to its treatment of aliens' (emphasis added). Similarly, in the section on expulsion of persons, no mention is made of the principle of *non-refoulement* of refugees or the human rights implications of expelling the family of a national. The section on the law of the sea, whilst being essentially accurate, does not state the source of rules that are related, namely, whether they are customary, in the 1958 Conventions or in the 1982 Convention. Although his statement that 'fault' is not an essential ingredient for the notion of international responsibility is correct, it is misleading because the rule itself may be to take care, and the violation of this entails responsibility, as in certain minimum standard cases. On this subject, this reviewer is unconvinced of the author's repetition of the notion of direct versus indirect injury or claims. The breach of duty in many international minimum standard cases is the failure to act by organs of State and, conversely, injury to nationals may be seen as a direct injury to the State. The fallibility of the direct/indirect formula is illustrated in one section where the author correctly explains that the local remedies rule only applies when the individuals concerned have sought a connection with another State. This tends to indicate, to this reviewer, that responsibility is based more on a balance of sovereign interests than a direct/indirect concept.

The most important addition in this third edition, however, is the chapter on the use of force. The first part of the chapter explains in a fairly orthodox way the notions of 'war' and 'armed conflict', and the historical development of the *jus ad bellum*. The second part of the chapter, however, should have been the subject of an article rather than part of a textbook, for the author's views are just far too controversial to be let loose on a beginner in international law. The main thrust of his argument is that the right of self-defence is total, and that as the United Nations does not function as foreseen, only the State which perceives itself as threatened or attacked can decide whether and how to use force (including the use of nuclear arms!). He denies that there is such a rule as the need for 'necessity' and 'proportionality' in self-defence and even suggests that if *jus cogens* exists, a good example of this would be the rule that 'every nation is free at all times and regardless of treaty provisions to defend its territory from attack' (p. 299). He finds no difficulty, therefore, with pre-emptive strikes and also believes that reprisals involving the use of force are legal. Thus he totally disparages the importance of the Caroline incident, the doctrine of which has since been affirmed by the Nuremberg Tribunal and major Powers. He reserves his most virulent opinions for the judgment of the International Court of Justice in the case of *Nicaragua v. USA*, which he disagrees with on virtually every count, including the fact that the Court considered itself capable of judging the case on the basis of international customary law. Admittedly, one could argue with the Court's finding that the Charter reflected customary

law in 1945, but the Court did say in the same sentence that the Charter has influenced customary law since then, which Maryan Green chooses to ignore. Unfortunately, lack of space does not allow a full reply to his statements, but to this reviewer they seem, in general, unnecessarily the epitome of 'right-wing' thinking, with no sensitivity for other views.

This reactionary flavour to the book unfortunately spoils what would otherwise be a clear beginner's textbook, with most non-controversial subjects being well-explained and having, ironically, a positive view of the usefulness and need of international law.

LOUISE DOSWALD-BECK

Public International Law and the Future World Order: Liber Amicorum in Honor of A.J. Thomas, Jr. Edited by J.J. NORTON. Littleton, CO: Fred B. Rothman & Co., 1987. xxxii + 574 pp. \$47.50.

This book, which has not been typeset, is the result of a Conference held at the Southern Methodist University School of Law. The object of that gathering was apparently to honour Professor Thomas with a discussion of topics from all areas of international law. The reader should therefore not expect a collection of essays on the future of world order alone, but rather a volume of twenty speeches and articles of differing length and quality, also covering private international law, EEC law and even comparative law. For reasons of space this review will have to be confined to the contributions connected with the title of the book.

The substantive part of the volume begins with a very brief and therefore somewhat shallow outline by William Bishop Jr. on 'The Role of International Law in a Peaceful World'. Bishop finds comfort in the fact that international law is being routinely applied in today's world, but laments the absence of compulsory jurisdiction when disputes arise between States. Despite a certain lack of effectiveness which he detects in contemporary international law, Bishop concludes optimistically that the international system is moving gradually towards a 'world rule of law' (p. 14).

The views of Rui Mu on 'Future Possibilities of International Law and the World Economic Order' from a Chinese perspective are again brief, but interesting. Mu, who openly admits to China's Third-World status, distances himself from some of the more progressive international lawyers. For example, he does not claim that the UN resolutions on a New Economic Order are actually the governing law already. Overall, Mu's remarks seem to reflect China's desire to be taken seriously as a stable trading partner and a secure place for investments.

Thomas Frank's contribution on 'The Prerogative Powers of the [UN] Secretary-General' is a lucid survey of mediation and fact-finding undertaken by successive UN Secretaries-General without specific authorization by the Security Council or the General Assembly. He concludes that consistent practice from Lie to de Cuéllar has firmly established the Secretary-General's right to undertake such activities.

Another interesting contribution is furnished by García Amador. In his 'Conflicting Views on Expropriation' the author exposes superficiality and fault in some modern re-evaluations of the applicable law. On that basis he warns against attempts to change the traditional law on sovereignty over natural resources without first having understood it properly. The effectiveness of Amador's well taken argument is, however, diminished by poor editorship of the article.

Covey T. Oliver adds a dim view of the 'World Court and World Order' to the selection of essays. He fears that the Court may be drifting progressively into the sphere of irrelevance. His criticism of the Court, and the States which fail to use it, is somewhat harsh, and not always well supported. Oliver argues convincingly against recent proposals made by Falk to enhance the status of the Court, but fails to add better suggestions of his own.

Theo Van Bovens' sketch on 'Human Rights and World Order' contrasts the Western/liberal ideals enshrined in the Universal Declaration of Human Rights with the current realities of suffering and deprivation in many parts of the world. The writer proceeds casually to

link human rights to 'liberation' without properly clarifying the concept he is invoking. Radical cures for the present ills of the world are, however, rejected by Van Bovens, who urges us to continue the quest for human rights within the realities of the current State-centered system.

The following two articles deal with the law of the sea. K. R. Simmons, in his usual manner, offers a very informative overview of the structure and work of 'The United Nations [Law of the Sea Convention] Preparatory Commission and the Future of Deep Sea Mining' up to 1984. Simmons then briefs the reader on the 'Mini Treaty' controversy. By way of conclusion he predicts that the industrialized States which have chosen to stay outside of the UNCLOS III deep sea mining regime, and especially the USA, will not revise their position until the guarantees offered for pioneer investors within the framework of the Preparatory Commission have been widened considerably.

Paul Trejos presents a 'Latin American View on the Law of the Sea'. He reminds us of the innovations in general international law which were pioneered mainly by statesmen and writers from South America. In his remarks focused on the law of the sea he traces the concept of the 200 nm exclusive economic zone back to the desire of the Latin Americans to be compensated for the lack of an exploitable continental shelf. His description of the legal nature of the EEZ is perhaps a bit rushed.

The last contribution to be surveyed here comes from the pen of Ann Van Wynen Thomas, the wife of A. J. Thomas in whose honour the collection of essays was published. Her piece on the 'Attempts to Control Chemical and Biological Weapons' shows her superb knowledge of that area of arms control. She demonstrates effectively that the law on the subject is far from settled and clear, and regards the current efforts to achieve additional legal regulation with considerable scepticism. It would be interesting to know whether the exciting recent developments in the area of arms control verification, and especially on site inspection, would lead her to a more optimistic conclusion.

The other, in part substantial, articles in the book are: Grossfeld, 'Transnational Corporations and the Reorientation of International Economic Law'; Bolger, 'The Interrelation Between Comparative Law and Private International Law'; Ebke, 'Enforcement Techniques Within the European Communities'; Sandrock, 'Dispute Resolution in International Business Transactions'; Bunge, 'The Calvo Doctrine and the Codes of Conduct for Transnational Corporations'; Gold, 'Public International Law in the International Monetary System'; Buxbaum, 'The Role of Public International Law in International Business Transactions'; Salacuse, 'Toward a New Treaty Framework for Direct Foreign Investment'; Norton, 'International Law and the Remaking of Western Europe'; Carl, 'The Latin American Integration Association'; and Allan and Hiscock, 'Economic Cooperation in Investment Regimes in the Pacific Basin'.

MARC M. WELLER

Nuclear Weapons and International Law. Edited by ISTVAN POGANY. Aldershot, Hants: Avebury Gower Publishing Co. Ltd., 1987. xiii + 253 pp. + index, £25.

The current debate about the modernization of NATO's shorter-range nuclear weapons in Europe adds significance to this volume, which was conceived by the Faculty Staff Seminar at the University of Exeter in 1985.

The first two chapters repeat the well-known controversy about the legality or illegality of possession and use of nuclear weapons. The first essay by Malcolm N. Shaw is written from a traditionalist viewpoint. The author leads us through the main strands of the general obligations arising from the conventional and customary laws of war. He rejects the attempts to illegitimatize the utilization of nuclear weapons in war through United Nations General Assembly resolutions and defends NATO's current first use strategy. Shaw does, however,

conclude from his survey of the laws and customs of war that the use of warheads larger than rookt would 'almost invariably be unlawful', unless they are launched as a 'graduated response' (p. 17).

Nicholas Grief's article on 'The Legality of Nuclear Weapons' actually represents a different school of thought from that which the title would suggest. Grief argues that *any* use of nuclear weapons would be illegal, because '... the nature of nuclear weapons makes it virtually inevitable that indiscriminate effects would accompany their use' (p. 28). This broad statement, which ignores, for example, the possibility of a strictly limited use of nuclear battlefield weapons on land, or their use against ships isolated on the high seas, is based on the familiar exegesis of the laws of war, the Genocide Convention, the Nuremberg Principles, the regulations for environmental protection and General Assembly resolutions.

The author stretches his argument further when he concludes that even the possession of nuclear weapons is illegal. Grief makes a brave attempt to defend this difficult position, but he fails to produce much evidence of law on which he could base his argument. For example, he cites a UN Human Rights Committee Report in support of the contention that nuclear weapons are inherently illegal (p. 40). The passage which he paraphrases does, however, not make that point, and even if it did, its legal persuasiveness would be rather questionable.

The author's contention is further undermined in almost an amusing way by his own article later in the book currently under review. In his discussion of nuclear tests (last chapter) he argues extensively that atomic testing even in the atmosphere is not at all illegal *per se* under general customary international law. This conclusion hardly squares with the assertion that already the deployment of nuclear weapons in itself constitutes, for example, 'a crime against peace' or a 'conspiracy to commit genocide' (p. 41). If deployment would have to be classified as a crime against peace and conspiracy to commit genocide or any other violation of general custom or even *jus cogens*, then the testing of nuclear weapons in preparation for possible use would surely have to fall under the same category of illegality.

Mark Janis poses the question 'Do "Laws" Regulate Nuclear Weapons?' The author briefly introduces H. L. A. Hart's general concept of law. He then produces an atypically shallow and perhaps distorted overview of the historic development of the laws of war. In the end, Janis seems to offer the proposition that legal regulations covering nuclear weapons may or may not be considered a legal system in Hart's sense, depending on one's own viewpoint.

Istvan Pogany adds a re-evaluation of 'Nuclear Weapons and Self Defence in International Law' to the collection of essays. That topic was hotly contested some twenty years ago, and has mostly been treated in footnotes since then. Pogany brings the discussion of the subject up to date and adds his analysis of the legal views put forward on the occasion of Israel's destruction of the Iraqi nuclear facility Osirak in 1981. His clear grasp of issues of nuclear strategy makes this contribution especially worthwhile.

'Nuclear Weapons and Non Proliferation: the Legal Aspects' by John Woodliffe is a well crafted, but perhaps slightly unexciting piece of work. The reader is lead through a brief history of the movement towards non-proliferation, introduced to the structure of the legal framework and then confronted with its current problems. A more daring attempt to analyse the (customary ?) legal nature of the Non-Proliferation Treaty regime in the light of the small but significant number of non-signatory States is not made.

Iain Cameron covers the still controversial issue of 'Anti-Ballistic Missile Systems and International Law'. He is well versed in the political and legal aspects of the SDI issue, and ably defends the traditional interpretation of the ABM Treaty in this adequately documented contribution.

Patricia Birnie uses her article on the 'Law of the Sea and Nuclear Weapons' to exhibit her expert knowledge on law of the sea. She covers the major aspects of the strategic uses of the high seas, the EEZ and territorial seas concisely. Questions of the current status of customary international law in light of the failure of the United Nations Convention on the Law of

the Sea to achieve universal acceptance are not dealt with in detail. Since even the treaty law, in so far as it is applicable, is often open to a variety of differing interpretations with respect to military use of the seas, a deeper investigation would certainly have been appreciated by many. However, considering the limited space of an article, the author manages to give an excellent overview.

'Nuclear Weapon-Free Zones' are treated authoritatively by David Freestone and Scott Davidson. The authors adopt a sober view towards NFZs, which they examine in quite some detail in terms of both politics and law. Their well documented article will certainly become a major reference point in future discussions of this currently neglected topic, which is bound to gain in relevance over the next years.

Nicholas Grief concludes the book with the essay on 'Nuclear Tests and International Law' which has already been mentioned above. He surveys the applicable arms control law, and the preparatory documents of the 1958 Law of the Sea Conference, but omits to investigate in any detail whether the 1982 Convention might have added anything to that discussion. Grief's analysis of the atmospheric testing issue in terms of customary international law is well argued, but possibly controversial. He concludes that there is no prohibition of nuclear testing in the atmosphere *per se* in general customary international law. Instead, he attempts to construct a prohibition of atmospheric testing from reasonable use theories based on treaties governing the freedom of sea and air transport, the weak international environmental law, and even the rather unspecific human right to life.

With some exceptions, this book is overall a very helpful collection of articles. Most of the contributions are argued tightly in terms of law, and not in terms of abstract human aspirations. The inclusion of articles on subjects usually not covered in treatments of nuclear weapons and international law makes the book especially valuable.

MARC M. WELLER

State Immunity: Some Recent Developments. By CHRISTOPH H. SCHREUER. Cambridge: Grotius Publications Ltd., 1988. xxiii + 200 pp. £28.

Professor Schreuer's book, published in the Hersch Lauterpacht Memorial Lecture Series, is based on thorough research, a clear presentation of some new cases concerning State immunity, an up-to-date account of a variety of national legislation, the European Convention on State Immunity, and also the present achievements of the International Law Commission and International Law Association. The book consists of seven chapters: 1. Introduction; 2. Commercial Transactions; 3. Torts; 4. Arbitration; 5. State Entities; 6. Enforcement; 7. Conclusions.

As to the distinction between commercial and non-commercial activities of a State, the author rightly stresses that such a distinction is not 'unworkable', although he admits that it is not possible to draw a precise line, and a border-line area will always remain. This area (called by the author the 'grey zone') can be narrowed if the right criteria are employed, and if courts are prepared to look beyond national confines to try to find common international standards (p. 41). His criteria are broadly as follows: 1. Who participated in the transaction? 2. What could be regarded as the claimant's legitimate expectations towards the defendant State? 3. Was the entire setting of the contacts between claimant and State defendant typically commercial? 4. Did the State use its sovereign prerogative in effecting the transaction, for example by granting tax exemptions or promising future preferential treatment in a non-commercial context, or did it use purely commercial incentives? 5. Were the legal forms and methods employed in the transaction purely commercial such as purchase of goods, issuing letters of credit, or did the State employ methods not typical of normal business methods? 6. Would denial of immunity to the defendant State have purely commercial consequences or

would it involve 'political' implications atypical of a private defendant? 7. What effects will the granting or denial of immunity have on the planning of similar transactions in the future? (p. 42). Not surprisingly, Professor Schreuer concludes that none of these criteria provides a safe answer by itself. But he suggests that taken together they will usually give satisfactory guidelines for this difficult distinction (p. 43).

There are many problems on the international plane which are not clearly regulated by international law, because of lack of unanimity among the States. One prominent example is nationalization and resulting problems like standards of compensation. The absence of an agreed rule as to the standards of compensation makes it necessary to examine each case separately against certain criteria. A composite test balancing a number of different factors might become one of the solutions. Thus Professor Schreuer's approach could be capable of being applied also to other situations.

A particularly interesting dimension is presented by the part of the book devoted to torts as exceptions to State immunity. This aspect of the problem is of increasing importance, especially in situations where the territorial link (most probably still necessary in order to establish a waiver of immunity) is not so clear. According to the author, 'the strict rule that the tort must have been committed entirely in the forum State might, one day, be replaced by a more flexible "effects" principle, under which immunity might be withdrawn when a tort committed abroad shows direct effects in the forum State. This would permit jurisdiction over State-sponsored trans-boundary terrorism by way of letter bombs, explosives placed on board aircraft, and proverbial shots across the border and also over instances of trans-frontier pollution' (p. 61). Perhaps this could lead to a situation wherein 'violations of international law amounting to criminal activity, such as terrorism and other gross violations of human rights, should not be covered by State immunity' (p. 57).

Since most of the recent codifications of State immunity law also include references to arbitration agreements as an exception to immunity, the author examines State immunity to reach a conclusion according to which 'undertakings to arbitrate should be accepted as independent exceptions to State immunity, but only to the extent covered by the original agreement to arbitrate' (p. 91). Here Professor Schreuer predicts that 'a reasonable assumption of jurisdiction over awards rendered abroad in combination with the application of treaty obligations to implement non-national awards should provide a realistic chance for victorious private litigants to find a forum to have an award in their favour implemented against a foreign State' (p. 91).

A lot of confusion in the area of State immunity is caused by the variety of entities which play a considerable role on the international plane and are claimed to be entitled to immunity. The author's presentation of this rather controversial aspect of the problem of State immunity is very interesting. The method of examination previously applied in the book here brings good results. An analysis of municipal legislation and recent cases leads Professor Schreuer to the acceptance of a functional approach towards the immunity of State entities. He observes that 'the decisive aspect is not status but whether the transaction or act which gives rise to the claim is of a governmental or public nature or merely a private act' (p. 95). Such a view is logical but it may create some difficulties in practice. For in such situations courts confronted with the issue of immunity will have to test it against the background of foreign law. The difficulty will be particularly acute in cases where there are significant discrepancies between the two systems. The author notices that especially in socialist structures, Western concepts of legal personality or ownership may be almost impossible to apply (p. 122). Professor Schreuer's suggestion as to future development in such cases reflects his common sense. He says that 'an economic policy based on the deliberate and calculated breach of contractual obligations is not going to yield long term advantages to the country concerned. The loss of good will and credibility is likely to inflict considerably more damage than the performance of an unprofitable contract' (p. 118).

Enforcement once the issue of immunity has been decided seems to create a number of difficulties, for this usually means enforcement of a decision of a foreign court. It should not

surprise the reader that 'State practice has been rather more cautious about withdrawing immunity from execution than about denying immunity from jurisdiction' (p. 126). Thus the gap between jurisdiction over foreign States and enforcement against them has not been closed (p. 167). 'Situations in which a successful litigant is left without an effective remedy for enforcement are', according to the author, 'likely to remain common' (p. 167).

In his conclusions Professor Schreuer makes the point, among others, that national legislation may present new standards for international law and may have a certain 'model' effect. He hopes that the recent codifications will become the starting-point for more precise and rational standards of customary international law (p. 170).

This is an excellent piece of scholarship very handsomely produced.

Z. WLOSOWICZ

State Responsibility and the Marine Environment: The Rules of Decision.
By BRIAN D. SMITH. Oxford: Oxford University Press, 1988. xviii + 281 pp. (including bibliography and index). £30.

This relatively slim volume is another in the series of Oxford monographs in international law. The book is essentially a Ph.D dissertation that attempts to bring together, in the context of the marine environment, three areas of customary international law: State responsibility, State jurisdiction and the law of the sea. The underlying assumption of the book is that the international law applied to decide specific cases of injury to the marine environment emerges from the confluence of those three areas of customary international law. The merit of such an exercise is that it presents both the international law academic and the practitioner with a useful, albeit somewhat broad, analytical model that might be applied not only to the marine environment but also to other law of the sea topics and to other subject areas of international law.

The advantage of the dissertation format is that the book contains a well-annotated and concise exposition of the basic international law on both State responsibility and the law of the sea. Inasmuch as the author concludes that existing law is a 'perfectly adequate foundation for an equitable and effective regime' for determining State responsibility for marine environmental injury, the book presents little that is substantively new that could not be obtained in more depth by reference to the major works on State responsibility or the law of the sea.

The book is divided into three parts. Part I summarizes (in 60 pages) the general rules of State responsibility applicable to breaches of any international law norm. Here, the book endorses the prevailing objective theory of State responsibility, reviews the principles for attribution to a State of the acts of State organs, agents and private parties, and deals with the special problems associated with a single set of circumstances which may give rise to multiple State responsibility. In the latter regard, the emphasis is on the consequences of multiple State responsibility especially the problem of compensation. The author suggests that the international system should borrow from municipal law a scheme of joint and several liability coupled with a right of contribution.

Part II sets out (in 62 pages) the specific rules of customary international environmental law that a State is obliged to follow. Specifically, it applies interrelated and familiar customary international law principles — *sic utere tuo ut alienum non laedas* (one must so use his own as not to do injury to another), good neighbourliness, the prevention of abuse of rights, and the associated procedural duties to inform, consult and negotiate — to three *loci* of environmental injury: injury within the territory of another State; injury beyond State territory; and injury within the polluting State's territory.

Part II closes with an examination of the degree to which a State is strictly responsible for private conduct without regard to fault. Here, the book assesses strict responsibility in the

context of international law cases, State practice, and the writings of publicists. The *Corfu Channel* case, *ICJ Reports*, 1949, p. 3, is somewhat miscast as a decision that more comfortably reflects a negligence approach than a strict responsibility approach on the grounds that the ICJ implied that, without knowledge on Albania's part of the presence of mines in its territorial waters, no State responsibility could arise for the damage to British mine-sweepers. However, in the *Corfu Channel* case the ICJ found Albania responsible even though it never factually established that Albania actually knew of the mines and the decision pointedly observed that Albania had the *means* of knowledge at its disposal and that this was sufficient in those circumstances to find State responsibility.

Part II also discusses *actio popularis* (i.e. a right vested in any State to vindicate a public interest) in the context of harm occurring beyond the polluting State's territory. Here, the book correctly concludes that *actio popularis* is not a functional principle of customary international law upon which a State may establish the legal interest requirement for *locus standi* to pursue a claim. However, in the process of reaching that conclusion, the book mischaracterizes the *Barcelona Traction* case, *ICJ Reports*, 1970, p. 3, and the joint dissent in the *Nuclear Tests* cases, *ICJ Reports*, 1974, p. 253, as endorsements of *actio popularis*. In *Barcelona Traction*, the ICJ was careful to state that community interests capable of protection must be derived from 'principles and rules' which have 'entered into the body of general international law' or are conferred 'by international instruments of a universal or quasi-universal character': *ICJ Reports*, 1970, at p. 32. That is, community interests do not inure to a party by the mere fact of its membership in the international community. Similarly, the joint dissent in the *Nuclear Tests* cases made it clear that there would have to be a determination whether the asserted general rule prohibiting atmospheric nuclear tests actually 'confers a right on every State individually to prosecute a claim to secure respect for the rule': *ICJ Reports*, 1974, at pp. 369-70.

Part III (in 122 pages) states the existing law of the sea governing State legal authority over ocean vessels, and the juridical maritime zones. The major contribution of Part III is its application of the general and specific State responsibility rules summarized in Parts I and II to the exclusive economic zone and the high seas. Apart from this analysis, however, one could obtain a deeper and better written exposition of the current law of the sea in a concise but thorough form in Churchill and Lowe's *The Law of the Sea*, recently issued in its second edition. Curiously, there is little discussion in depth of the contiguous zone, continental shelf and deep sea-bed.

The overall criticisms of the tripartite organization of the book are three. First, the division among general and specific State responsibility rules and the law of the sea leaves an impression that a bright line, easily discernible, exists between the three areas. For example, the discussion in Part I of the general rules of State responsibility contains little or no reference to the specific rules of State responsibility for environmental law or the law of the sea. While this separateness might be necessary from an organizational point of view, some acknowledgment of their interdependence would seem to be required.

Secondly, the analysis tends to flow one way from the general State responsibility rules down to the rules of decision for the law of the sea. Certainly there is some flow and influence the other way. Perhaps an introductory chapter to explain the analytical model and the interaction among the three areas of law would have been especially helpful here.

Finally, the book does not deal adequately with the question of the need for a demonstration of potential or real material damage as a predicate to State responsibility for marine pollution. For the most part, State responsibility for injury to the marine environment revolves around the fact of pollution. And arguably a threshold definitional and factual requirement for pollution is material damage. That requirement would seem to be relevant, at a minimum, to the author's discussion of injury, liability, multiple State responsibility and *actio popularis* and should have been treated in some depth.

Repertório da Prática Brasileira do Direito Internacional Público. Edited by ANTÔNIO AUGUSTO CANÇADO TRINDADE. Brasília: Fundação Alexandre de Gusmão, 1984-88. 6 volumes: Periods 1889-1898, 271 pp.; 1899-1918, 518 pp.; 1919-1940, 278 pp.; 1941-1960, 365 pp.; 1961-1981, 353 pp.; General Analytical Index, 237 pp.

Despite the accelerating rate of growth of multilateral conventions, many issues of public international law can still be determined only by the application of customary rules in which State practice plays the dominant creative part. In order to determine the existence and scope of any given customary rules those concerned must turn to the evidences of State practice most readily available to them, and for long this meant the practice of only a few States of which the USA, the UK and France were the most accessible. The last twenty years, however, have seen the practice of more and more States become available for public scrutiny, often as the result of academic enterprise rather than through the initiative of the governments themselves. Publication takes the form either of digests covering a substantial number of years in a single work, for example Italy, Switzerland and Japan, or, and in some cases additionally, annual or more regular surveys of practice, for example Belgium, the Federal Republic of Germany, Australia, Canada, Switzerland, Japan and the Netherlands. Brazil has now joined the former category with a substantial multi-volume digest covering the second half of its independent history.

The present work appears to be the fruit of private enterprise, commissioned in 1982 by the Alexandre de Gusmão Foundation and the Rio-Branco Institute. It had the good fortune to obtain as editor Professor Trindade, at that time a university teacher of international law but since August 1985 legal adviser to the Brazilian Foreign Ministry. In addition to the editing and arrangement of the material reproduced, Professor Trindade, who in his office is successor to such distinguished jurists as Bevilacqua, Carneiro, Accioly and Valladão, has contributed substantial and stimulating introductions to each of the volumes in which he discusses aspects of the role of State practice in the formation of international law. It is a tribute to the energy of the editor and to the seriousness of purpose of the bodies supporting him that the entire work has been produced within six years. Thus Brazil has one of the most up to date digests of practice and it is proposed to issue in the near future a second edition to the last substantive volume which will bring the practice up to the end of 1986.

Even before the present work was commenced, Brazilian practice was available to an extent greater than in many other countries, though largely inaccessible to most scholars outside Brazil. Thus, for example, the reports (*Relatórios*) of the Foreign Ministry to the President sometimes reproduced diplomatic correspondence. An interesting example of this was in respect of the dispute between Britain and Brazil over the sovereignty of the island of Trindade at the end of the last century, which is reproduced in part in the first volume. Furthermore, the papers of some Foreign Ministers, in particular Rio-Branco, had been published in edited form, as had a selection of the opinions of the legal advisers to the Foreign Ministry. Indeed, relatively little of the material reproduced in the five volumes has not already been published in some form in Brazil. One might speculate that there could exist relevant unpublished material in the Brazilian State archives.

The arrangement of subject-matter in each of the five substantive volumes follows a uniform pattern. The main divisions are: foundations of international law, international acts (largely treaties), States, regulation of spaces, international organizations, individuals, settlement of disputes, and armed conflict and neutrality. Each of these parts is further divided into chapters. Examination of the main sources of the material reproduced shows that it has been culled from the legal opinions of the advisers to the executive, statements by Ministers to foreign States and to domestic audiences, diplomatic correspondence, pleadings before international tribunals, and, to an increasing extent, statements by Brazilian rep-

representatives to international meetings. There is relatively little in the form of statements in the legislature, thus contrasting with the practice in the UK and France. The decisions of domestic judicial tribunals are not within the catchment area.

Each item reproduced is headed by a short description of its immediate context and is followed by its source reference. There are no commentaries on the historical background to or significance of particular items; thus the items have to speak for themselves. The whole work is written in Portuguese and even when the original item was written and spoken in another language, as in the United Nations where Portuguese is not one of the official languages, the editor has translated it into Portuguese.

The General Analytical Index contains a table of contents for each of the five substantive volumes, drawn up helpfully in French and English as well as Portuguese. This is followed by an alphabetical index, tables of cases and treaties cited, and very useful historical lists of the successive Brazilian Foreign Ministers and legal advisers during the periods covered.

It is not proposed to attempt to review here the corpus of material reproduced. It reflects the important role played by Brazil in international legal relations down the years. In congratulating the editor on this major addition to the source material of international law, it is hoped that he will take the opportunity not only to keep the work up to date but to produce a further volume or volumes to cover the earlier part of Brazil's independent history.

GEOFFREY MARSTON

Perspectives du droit de la délimitation maritime. By PROSPER WEIL. Paris: Éditions A. Pedone, 1988. 319 pp. 200F.

Since the conclusion of the Law of the Sea Convention in 1982, the profusion of books and articles on the subject of maritime boundary delimitation, while always a fertile field for international jurists, has become a torrent in danger of overflowing its banks. Their number appears to multiply almost daily, with no end in sight. Most have the flavour of having been concocted in the detached atmosphere usually associated with the production of doctoral dissertations. It is therefore somewhat rare and satisfying to receive a book on this subject from an author whose views have been tested in a practical manner in specific boundary adjudications. Professor Weil's credentials as counsel for Canada in the *Gulf of Maine* case, and later for Malta in the *Libya/Malta Continental Shelf* case, bring to his work a tone of authority and sure-footedness that is a feature sometimes missing from many other recent treatises on the topic.

He introduces his book modestly with the declaration that he is not attempting to construct a comprehensive statement of the law of maritime boundary delimitation. He believes that the present state of the international law on the subject rules against any approach founded on a deductive rationale, suffused as it is with diverse principles and concepts, co-existing without apparent hierarchical structure. For the author, the law in this area is an '*ensemble discontinu*', where even complementary notions are expressed in varying formulations from one decision to the next. In some instances the rules are simply contradictory and incompatible.

Moreover, a close examination of the regime's precepts reveals that they are often expressed in words which appear banal and deceptively straight-forward. Such words as 'equity', 'special circumstances' and 'proportionality', being only some examples of the tendency, are often required despite their apparent simplicity to carry burdens of intricate and sophisticated legal import. Neither has the regime been adverse to the adoption of sloganeering techniques in the propounding of such notions as 'the land dominates the sea' and 'each case of delimitation is a unicum'.

In the midst of such confusion, some of it being created by them, international adjudicators have been asked to pursue a delicate balance between the necessity to establish rules of a general and permanent character, yet retaining practical significance for specific delimitations, as against the construction of a regime incorporating rules of such a general nature

that they are of no practical value. Professor Weil suggests that the regime's present energetic pursuit of individualized equity, tailored to fit the delimitation problem at hand, may have shifted the balance too far in favour of practical solutions, at the expense of the importance of the principle of generality to a rule of law. As a consequence the jurisprudence has not been able to avoid a contradiction between the judicial postures taken and the practical results achieved. This is clearly demonstrated in the most recent international adjudications. Invariably, the texts of awards or judgments commence with what purports to be an elucidation of the rules applicable to all maritime delimitations. But, as Professor Weil points out, in the latter part of such awards, where the construction of a specific boundary is attempted, the line of logical progression from the statement of the law to its application to the particular facts becomes decidedly obscure.

Professor Weil, perhaps as a man of practical affairs, is not surprised by such circumstances. He finds the law in this area to be far from mature with a distinctly unstable structure. In such conditions he disparages any attempt to erect a comprehensive scheme, preferring instead to direct his analysis to particular currents and cross-currents, which may be suggestive of the law's future course of development.

In the book's first section, the author examines the history of the effort of the jurisprudence to establish norms for delimitation of the continental shelf, from the 'natural prolongation' theory put forward in the 1969 ICJ judgment to the present propounding of the 'distance principle' in the *Libya/Malta Continental Shelf* case. His analysis carries special interest in that the author himself played no small role in that process. As counsel for Malta, his argument that the 'distance principle' was now part of customary international law, and the acceptance of that contention by the International Court, sounded the death-knell for the 'natural prolongation' theory. The author fails however to resist the opportunity to restate in this book the argument he made in the same case in favour of applying the method of radial projection for delimitation of boundaries of island States, which fell on deaf ears on that occasion.

The second section is entitled 'Unity or Diversity', and contains more than a few perceptive comments on some of the conflicting elements in the regime. Professor Weil engages in a rarely seen analysis of the contrasting criteria applicable to delimitations reached through negotiation from those applied in international adjudications. He also examines the more common question of the present day as to whether similar rules apply for delimitations of differing maritime zones, allowing for single or multiple maritime boundaries. He prefers the single boundary solution based on what he alleges to be practical considerations.

In the third and fourth sections the author confronts the issue that has plagued the regime since 1969 — the infusion of content into the ephemeral notion of 'equity'. Here, a procedural approach is advanced, arising from the example of the recent adjudications, where a useful two-stage conceptual structure appears to be emerging. The first stage involves the construction of the equidistance line. Such a line is viewed by Professor Weil as *prima facie* equitable, since it produces a delimitation that is both balanced and reciprocal. The application of equidistance becomes then not 'just one method among many', but *a priori* the best method to achieve an equitable solution. It is therefore entitled to a special place.

If the matter were to end at this juncture, there would be no role for international lawyers in the process. Maritime boundary delimitation would be simply a task for hydrographic surveyors. But as the international adjudications and the provisions of the 1982 Law of the Sea Convention indicate, a second stage is necessary requiring the application of the controlling criterion of 'equity'. This principle is resorted to for the purpose of examining and, if required, correcting inequities perceived from the construction of the equidistance line. Professor Weil pictures the transition as the conquest of the technical process of delimitation by the law.

But what are these rules of international law which serve to bring substance to the elusive notion of equity? Perhaps with an eye on his next boundary arbitration, Professor Weil comes firmly down in the middle. He suggests that, in the interests of encouraging a continued progression of the law in this area, tribunals would be wise

to adopt a minimalist approach in the application of 'equity' for the present, refusing to depart from equidistance lines too readily. This would presumably serve to diminish the *ad hoc* atmosphere surrounding the most recent international awards. Yet, on the other hand, the implications of this positivistic approach need not unduly concern the more relativist-minded arbitrators that Professor Weil may have to appear before in future, for he observes that as long as the regime retains this notion of equity, they will always have '... an impregnable bastion of discretionary power' (reviewer's translation) to employ when the situation warrants.

The book includes an excellent comprehensive bibliography of published articles on the subject. The absence of an index may irritate some. Nevertheless, it is a work from a man with such outstanding practical experience and enormous academic qualification in the field that no person seriously interested in matters concerning maritime boundary delimitation should fail to include this book in his or her library.

MICHAEL F. WALLACE

International Law and the Use of Force by National Liberation Movements. By HEATHER A. WILSON. Oxford: Oxford University Press, 1988. x + 188 pp. £25.

Humanitarian Intervention: An Inquiry into Law and Morality. By FERNANDO R. TESON. New York: Transnational Publishers Inc., 1988. xiii + 269 pp. \$50.

War, Aggression and Self-Defence. By YORAM DINSTEIN. Cambridge: Grotius Publications Ltd., 1988. xxvii + 295 pp. £52.

The frequency with which new monographs on the use of force appear is a reminder that, unfortunately, force is still a dominant factor in international relations. Miss Wilson's book is well-researched, but obviously the product of a background in international relations rather than law. Would any law supervisor suggest to a Ph. D candidate that, in an introductory chapter, she should examine the three questions: what is international law, who are its subjects, and what are its sources? Not surprisingly, the result is scarcely a contribution to knowledge marked by originality. Part I, entitled 'The Law', contains virtually nothing new.

Part II on self-determination is also rather familiar ground, although the conclusion that there is truly a legal right of self-determination is sound enough. The identification of the 'self' is more problematic, and the conclusions reached are less persuasive. In broad terms, the author would deny a right to secession unless the territory is geographically distinct and virtually non-self-governing. But then the author notes that there may be other competing principles. In the Falklands, for example, there is the competing claim by Argentina for sovereignty. Yet surely the point is that the right of self-determination takes precedence over claims of territorial title: in Goa, for example, there was not much doubt about Portuguese title, but it scarcely availed Portugal. It is perhaps more realistic to concede that rules or propositions cannot be formulated. The real question is whether the world community as a whole will, or will not, recognize the legitimacy of the claim — and that depends upon a whole variety of factors, political, economic and geographical.

Part III is entitled 'Right Authority', and it deals with the authority of national liberation movements to use force. This is perhaps the best part, with a thorough review of actual practice, followed by an accurate, though summary, review of the 1977 Protocols. The final part surveys the law of armed conflict in wars of national liberation and is most useful in its discussion of actual practice, showing that, whilst frequent controversies over status and entitlement occur, the actual practice is to accord members of such movements their rights under the 1977 Protocols.

Professor Teson's book is a brave attempt at wishful thinking. He assumes that if the philosophical basis for humanitarian intervention can be established, its legal validity follows.

Unfortunately, State practice does not conform to this kind of logic, and the crucial question remains: does the practice of States in the post-Charter era support such a right? Thus, however fascinating the excursus into the philosophical wringings may be — and we read an impressive list of references to Grotius, Hegel, Rawls, Hobbes, Elfstrom, Walzer, Montaldi, Luban and Doppet — that question remains.

In Part Two the author attempts to answer it. But the answer consists in the argument that the language of Article 2(4) does not prohibit humanitarian intervention, that the collective UN mechanisms to remedy serious human rights violations are defective, that the legitimacy of assistance to peoples struggling against 'racist' regimes is now established (which presupposes a violation of human rights), and that there is now a sufficient basis of State practice to support it.

It is this last strand of the argument that is crucial. Let us therefore examine his examples of State practice. First, the Tanzanian intervention in Uganda in 1979 was not overtly based on the assertion of such a right of intervention, but rather on a right of self-defence following the Ugandan invasion of Tanzanian territory. Whether the right of self-defence was properly invoked is irrelevant. Doubtless it was the appalling human rights record of General Amin that denied him any general support by third States, but this is very different from arguing that third States accepted the legitimacy of the Ugandan invasion on the basis of humanitarian intervention. The French intervention in Central Africa in 1979, in deposing Bokassa, was certainly motivated by humanitarian considerations, but it was formally justified as an intervention by the consent of the new government. It may well be that this does not fit with the facts, since the French intervened prior to the success of the *coup*, but what is critical is that France did not feel able publicly to invoke humanitarian intervention as the legal basis for her action. The Indian intervention in Bangladesh in 1971 is a better example, but even that example is obscured by the fact that India also invoked the right to support the Bengali people in a struggle for self-determination. The US intervention in Grenada in 1983 is a poor example. There the US certainly invoked intervention by consent. And the Court's judgment in *Nicaragua v. US* is not really apposite, for the Court did not see humanitarian intervention as the issue.

So we have a brave argument and, as a statement of what the law *ought* to be, it elicits much sympathy. But the law is what States do, not what professors think they should do.

Professor Dinstein's book is a significant publication. It is a wide-ranging study in three parts, covering respectively the legal nature of war, the illegality of war and exceptions to the prohibition of the use of force.

He distinguishes war in the technical sense (formally declared) and war in the material sense (a comprehensive use of force by at least one party) and is opposed to the idea of a *status mixtus* if this is construed as a justification for evading the duties imposed by the laws of war. Essentially he argues that 'assuming that large-scale hostilities are actually raging, and that the *jus in bello* ought to be applied in its plenitude, a negation of the existence of a state of war appears to be no more than a hollow semantic gesture' (p. 141). And this is not because he sees Article 2(4) as now irrelevant: on the contrary he argues strongly for its continuing validity (p. 93). Indeed, he is critical of the attempts to minimize the scope of the prohibition by recourse to concepts of the legitimacy of wars of national liberation (p. 68) or the right of humanitarian intervention (p. 89).

The appeal to realism is attractive. But there is a risk that, in continuing to recognize the institution of war, we recognize the traditional institution, unlimited as to aims (even if regulated as to means); whereas if what is recognized is the validity of war *in self-defence*, this immediately imparts restrictions on the aims that are legitimate. Take, by way of illustration, the Falklands conflict. Professor Dinstein adopts the traditional assumption that all the territories of belligerent States are in the region of war (p. 22). Yet one effect of construing the British military operations as self-defence was to limit those operations to what was strictly necessary to self-defence and thus avoid extending the conflict to the Argentinian mainland.

Or take the question of post-belligerency territorial changes. A policy based on self-

defence would, in principle, seek the restoration of the *status quo*, rather than territorial gain. Professor Dinstein notes essentially three propositions: the aggressor may not gain, the victim State may do so, but a long-continued occupation may, *post debellatio*, ripen into title (pp. 157–161). Given that an authoritative determination of which State is the aggressor, accepted by both parties, is beyond contemplation in realistic terms, it is obvious that the author's approach abounds with difficulties.

Part Three contains a detailed analysis of self-defence which is clearly the result of long and thoughtful study. The problems are frequently illustrated by hypothetical examples. Professor Dinstein is quite confident that the restriction of the right in Article 51 to cases of 'armed attack' was deliberate (although it is not clear what his evidence is for this view), and he categorically rejects the validity of any pre-emptive strike. He would have justified the Israeli strike against the Iraqi Osirak reactor in 1981, not on the basis of self-defence but as a legitimate act of war during a war still in progress between Israel and Iraq (p. 176). One thus has a very good example of the difference it makes whether one regards legitimate hostilities as limited by the requirements of self-defence, or not.

However, the author makes a highly interesting distinction between anticipatory self-defence (which he regards as excluded by the Charter) and *interceptive* self-defence (p. 180). It is the idea that it remains legitimate self-defence to act against an attack which has been initiated, even though the blow has not yet been delivered (he gives the example of the Japanese fleet at sea en route for Pearl Harbour). He is highly critical of the Court's judgment in the *Nicaragua* case, in particular the use of the concept of 'counter-measures' permissible against forcible measures short of an armed attack (p. 183).

Chapter 8 on the 'modality' of individual self-defence is very well conceived, and helpful because of the use of examples, and this reviewer would share the view that a time-lag between attack and response ought not to convert measures of lawful self-defence into unlawful measures of reprisal. But the view that the US air-strike against Tripoli in April 1986 was a 'defensive armed reprisal' makes some very questionable assumptions of fact. The view that the requirement of proportionality becomes irrelevant once the measures are *belligerent* again assumes, questionably in this reviewer's opinion, that self-defence becomes irrelevant.

Chapter 9, on collective self-defence, is an intelligent, constructive essay on a highly controversial topic. The core of the problem is to define the circumstances under which State A, not itself under any direct armed attack, can take military action against an aggressor State B, whose immediate victim is a third State C. Professor Dinstein appears to require clear evidence that State A's own security is endangered, for he says 'collective self-defence is above all the defence of self' (p. 248). This reviewer would agree. And he goes on to suggest that the Court's insistence on a prior request for help by C (in the *Nicaragua v. US* case) would be correct only where A's military action took place within State C's territory, but not otherwise (pp. 249–50).

A final chapter on collective security gives a realistic, and objective, assessment of the respective roles of the Security Council and General Assembly. In his Conclusion he notes that, in practice, the emphasis has shifted from collective security to collective self-defence, and he argues for a realistic acceptance of the fact that war remains a contemporary problem.

This is, then, an excellent book on a highly controversial topic, free of the extreme notions which have all too frequently characterized the writings of scholars with sympathies for Israel. By that fact alone it will achieve more influence.

D.W. BOWETT

DECISIONS OF BRITISH COURTS DURING 1988 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW*

International organization—International Tin Council—Council insolvent and defaulting on payment of debts—whether members of Council liable to Council's creditors—status of Council under English law—whether Council the agent of its members—International Tin Council (Immunities and Privileges) Order 1972, Articles 2 (1), 4, 5, 6 (1), 8, 10, 12, 13—International Organizations Act 1968, Section 1 (2) (a), (b)—Headquarters Agreement 1972, Articles 2, 3, 8 (1), 23—International Tin Agreement 1981, Articles 1, 2, 4, 15(2), 16(1), (2), 21, 22, 24, 26, 27, 28, 29, 30, 31, 60 (2)

State immunity—whether State has burden of proving entitlement to immunity—appropriate judicial procedure when question of State immunity arises—whether contracts concluded by Council are transactions 'entered into' by member States—whether member States' obligations to Council's creditors fall to be performed in UK 'by virtue of a contract'—State Immunity Act 1978, Sections 1, 3 (1) (a), (b), 12

EEC—entitlement of EEC to jurisdictional immunity before English courts—Treaty establishing the European Economic Community 1957, Articles 178, 183, 210, 211, 215, 218—Treaty establishing a Single Council and a Single Commission of the European Communities 1965, Article 28—Protocol on the Privileges and Immunities of the European Communities 1965

J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and others and related actions, [1987] BCLC 667, QBD (Staughton J); [1988] 3 WLR 1033, [1988] 3 All ER 257, CA (Kerr, Nourse and Gibson LJJ). *MacLaine Watson & Co. Ltd. v. Department of Trade and Industry*, [1987] BCLC 707, Ch.D (Millet J); [1988] 3 WLR 1033, [1988] 3 All ER 257, CA (Kerr, Nourse and Gibson LJJ). As was recounted in last year's volume of this *Year Book*,¹ in October 1985 the International Tin Council (the ITC) ran out of money and ceased to trade, leaving debts of several hundred million pounds. The problem facing its many creditors is that the assets held in the UK by the ITC are apparently insufficient to enable it to meet its debts.² Moreover, there is no prospect that the States members of the ITC will volunteer to pay into its hands the sums needed to put it in a position to discharge its liabilities.³ The main hope of the ITC's creditors has, therefore, been

* © D.N. Hutchinson, 1989.

¹ 58 (1987), pp. 399–400 at nn. 1–6.

² Though, in *MacLaine Watson & Co. Ltd. v. International Tin Council (No. 2)*, [1988] 3 WLR 1190, [1988] 3 All ER 376, to be noted in next year's volume of this *Year Book*, Kerr LJ astringently observed that, having employed 'a formidable team of legal advisers' to fight every legal action brought against it, the ITC 'does not appear to be impecunious': p. 1195d; p. 377e.

³ Kerr LJ at p. 1048g; p. 269g; and see last year's volume of this *Year Book* at p. 420 n. 82.

Except where the context indicates otherwise, the phrase 'States members' and its cognates will here be used to include not only the States which are members of the ITC, but also the EEC, which is a member of the organization by virtue of Article 56(1) of the Sixth International Tin Agreement (the ITA).

that some means might be found to compel the member States to pay the organization's debts. To achieve this end, they have followed two principal paths. First, they have proceeded directly against the ITC, seeking to obtain recovery out of the assets held by the organization in its own name, but, at the same time, have tried to find some means whereby this might be done in such a way that the member States can be compelled to swell those assets by putting into the ITC's hands the sums necessary for it to be able to discharge its debts. Two actions of this type have so far been brought, both of which have proved unsuccessful.⁴ The second route which the creditors have followed is to proceed immediately against the member States and to attempt to recover from them directly the debts which the ITC owes. The actions which form the subject of the present litigation are of this second, 'direct', type.

Certain of the ITC's creditors have enjoyed the option of pursuing either of these two routes. Indeed, some have pursued both simultaneously.⁵ Others, however, have not been so lucky and have found that the first route is closed to them. This unequal situation among the creditors is a consequence of the fact that, while some have arbitration clauses in the contracts or loan agreements which they concluded with the ITC, others do not.⁶ Enjoying the right to invoke such a clause, the former are in a position to overcome the 'immunity from suit and legal process' which the ITC enjoys under English law,⁷ since, by obtaining arbitral awards in their favour against the ITC, they can then avail themselves of the exception to its immunity which exists in respect of proceedings for the enforcement of arbitral awards.⁸ The way is thus clear for them to bring suit against the organization by means of an action of the first type described above.⁹ The latter creditors, on the other hand, being unable to obtain such awards, cannot surmount the obstacle to bringing suit against the ITC which is posed by the organization's immunities.

⁴ *In re International Tin Council and Maclaine Watson & Co. Ltd. v. International Tin Council*. The decisions at first instance in these cases were noted in last year's volume of this *Year Book* at pp. 406-18 and 418-24, respectively. The decisions of the Court of Appeal, which add little to the decisions at first instance, will be noted in next year's volume of this *Year Book*. They can be found at [1988] 3 WLR 1159, [1988] 3 All ER 359, and [1988] 3 WLR 1169, [1988] 3 All ER 364, respectively.

⁵ Including certain of the plaintiffs involved in the present cases. Thus, Amalgamated Metal Trading Ltd. petitioned for the ITC to be wound up compulsorily under the Companies Act 1985 (see *In re International Tin Council*, loc. cit. above (preceding note)), while Maclaine Watson & Co. Ltd. applied for the appointment of an equitable receiver to take charge of the ITC's assets (see *Maclaine Watson & Co. Ltd. v. International Tin Council*, loc. cit. above (preceding note)).

⁶ Under Article 23 of its Headquarters Agreement, the ITC is obligated to include arbitration clauses in the contracts which it concludes with persons resident, and bodies incorporated or having their principal place of business, in the UK. Some of the second group of creditors fall within this description (see n. 11, below). The failure of the ITC to ensure that arbitration clauses were inserted in the agreements which it concluded with those creditors, therefore, represents a breach by the ITC of its treaty obligations to the host State—the UK.

⁷ Under Article 6(1) of the International Tin Council (Immunities and Privileges) Order 1972, SI 1972/120 (the 1972 Order).

⁸ Under Article 6(1)(c) of the 1972 Order.

⁹ Nevertheless, the ability of these creditors to bring themselves within this exception to the ITC's immunity will not ensure the success of any such action which they might bring. In view of its apparent insufficiency of funds, the creditors have little purpose to proceed against the ITC unless they can find some remedial right against it which will also enable them to compel the member States to swell its assets. However, at least certain of the remedial rights of this type which exist in English law do not fall within the scope of Article 6(1)(c), being incapable of classification as proceedings for the enforcement of a judgment or arbitral award. The petitioner in *In re International Tin Council* encountered just this problem: see last year's volume of this *Year Book* at pp. 416-18.

They have, therefore, been compelled to pin their hopes of recovering their debts on the success of a 'direct' action against the member States.¹⁰ Five of the plaintiffs in the present cases found themselves in just this position.¹¹

The origins of the present proceedings are as follows. R.J. Rayner (Mincing Lane) Ltd., a metal broker, had entered into a contract with the ITC to sell it a quantity of tin. When the ITC defaulted on payment of the purchase price, Rayner availed itself of the arbitration clause in its contract and obtained an award against the ITC for nearly £16.5 million. When, in its turn, this award went unsatisfied, Rayner instituted proceedings against the twenty-four members of the ITC—twenty-two foreign States, the UK (here represented by the Department of Trade and Industry) and the EEC—,¹² contending that they are liable to pay the sum which the arbitrators have found due to it. Similar actions were initiated by eight other metal brokers who found themselves in much the same situation as Rayner and had also obtained arbitral awards against the ITC which had gone unsatisfied.¹³ Further actions against the ITC's members were initiated by six banks which had made loans to the ITC which that organization had failed to repay.¹⁴ However, none of these banks had arbitration awards in their favour against the ITC and only one of them appeared to be in a position to get one.¹⁵ Staughton J ordered that the actions of the eight brokers and of the six banks be joined to Rayner's; but, in doing so, he imposed the condition that, in the proceedings before him, no issues were to be raised or considered which were not also raised by Rayner's points of claim.¹⁶ The defendants applied to have all of the claims against them struck out, alleging that they disclosed no reasonable cause of action.¹⁷ Staughton J granted their application.

At about the same time, a somewhat similar action was instituted by another metal broker, Maclaine Watson & Co. Ltd. The plaintiff company had contracted with the ITC to sell it a quantity of tin and had obtained an arbitral award in its favour against the organization, payment of the contract price having been unforthcoming. Indeed, it had even had judgment entered against the ITC when its arbitral award went unsatisfied; and when, in its turn, this judgment was not complied

¹⁰ The inability of these creditors to take the ITC to arbitration also poses a potential obstacle to the success of their 'direct' actions against the member States: see text at nn. 248–52, below.

¹¹ These five are all banks: Australia and New Zealand Banking Group Ltd., Arbuthnot Latham Bank Ltd., Banque Indosuez, Hambros Bank Ltd. and TSB England and Wales plc. In fact, only one of the six banks plaintiffs in the present actions has an arbitration clause in its loan agreement with the ITC—Kleinwort Benson Ltd.: Kerr LJ at p. 1054e–f; p. 273h.

¹² The defendants to this action are set out at p. 1050g; p. 271c–e.

¹³ These eight brokers were Amalgamated Metal Trading Ltd., Boustead Davis (Metal Brokers) Ltd., Gerald Metals Ltd., Gill & Duffus Ltd., Henry Bath & Son Ltd., Metalgesellschaft Ltd., Metdist Ltd. and Mocatta Commercial Ltd. At first instance, Staughton J found that only some of this number had obtained arbitral awards in their favour, though the remainder appeared to be in a position to secure them if they wished: p. 674i. In the Court of Appeal, however, Kerr LJ stated that all eight brokers have obtained arbitral awards against the ITC: p. 1054e; p. 273g.

¹⁴ For the identities of the six banks, see n. 11, above.

¹⁵ See text at n. 11, above. While Kleinwort Benson had not yet obtained an arbitral award in its favour, it appeared to be in a position to get one: Staughton J at p. 674h; and see last year's volume of this *Year Book* at p. 407 n. 27.

¹⁶ p. 672d–f. See also Kerr LJ at p. 1053g; p. 273b.

¹⁷ Formally, the grounds relied on to justify the applications varied as between the different defendants; but, as Kerr LJ observed, all of the applications were effectively based on the proposition that the points of claim disclosed no reasonable cause of action: p. 1054h; p. 274a.

with, the plaintiff sought to have it enforced by applying for an order appointing an equitable receiver to take charge of the ITC's assets. By this device, the plaintiff company attempted to compel the members of the ITC to swell the organization's assets and so put it in a position to discharge its financial liabilities.¹⁸ Simultaneously, it also sought to compel the ITC's members to pay the money due to it by the more straightforward means of a 'direct' action of the type brought by Rayner; but, whereas Rayner had impleaded the entire membership of the ITC, the present plaintiff proceeded solely against the UK, represented by the Department of Trade and Industry. The defendant applied to have the claim against it struck out as disclosing no reasonable cause of action, and Millett J granted its application.

The plaintiffs in both of these cases appealed against the orders to strike out their actions, and, since the principal issues raised by their claims were essentially the same, the Court of Appeal decided, as a matter of convenience, to hear their appeals together.¹⁹

In order to be able to recover from the member States the money which they are owed under their contracts with the ITC, the plaintiff brokers had to establish that, although those contracts were concluded with persons who had acted in the name of the ITC and of the ITC alone, they in fact created direct legal relations between themselves on the one hand and the States members of the ITC on the other, such that the member States owe to them directly an obligation to pay them the contract prices.²⁰ The plaintiff banks had to do likewise in respect of the loan agreements which they had made with the ITC. To accomplish this, the plaintiffs relied on three alternative arguments, which counsel conveniently summarized as follows:

One could first conclude that the ITC was a body with no juridical personality [in English law], that it existed as a business organisation, in the same sense as a partnership exists as a business organisation, but is in law simply a collective name in which the members are committed to contract, to own property and to do other things. Secondly, one could conclude that the ITC had some of the attributes of juridical personality, but that it did not have the attribute which is characteristic of most corporations, namely, that of being separate from its constituent members. The third possibility is that it is a wholly distinct person, in which case our submission is that it is a distinct person which was carrying on a business of buying and selling tin as the agents [*sic*] of the member governments who composed it.²¹

These three arguments will be examined in turn, and the judgments upon them, both of the Court of Appeal and of the two courts of first instance, will be analysed.

1. *The discrete legal personality of the ITC*

The plaintiffs' first contention was that, under English law, the ITC is not a discrete legal person, separate and distinct from its members, but is, rather, an unincorporated association, which is composed of its member States. It follows that, when officials of the ITC act in its name—as, for example, by concluding a contract or entering into a loan agreement—they are in fact acting on behalf of each

¹⁸ This application was noted in last year's volume of this *Year Book* at pp. 418–24. See especially *ibid.*, pp. 419–20 at nn. 82–4.

¹⁹ Kerr LJ at p. 1051e; p. 272a.

²⁰ It was assumed that the legal relations established by these contracts are governed by English law: Kerr LJ at p. 1062a; p. 279j.

²¹ Quoted by Staughton J at p. 684f–h.

and all of its members. Consequently, the plaintiffs' contracts and loan agreements in fact established direct legal relations between themselves on the one hand and each of the ITC's member States on the other, there having been no-one else—no legal person aside from the member States—for them to have contracted with. The plaintiffs conceded that, if the ITC is an unincorporated association, then it is an unincorporated association of a rather special kind, enjoying certain attributes which are not usually linked to such an organization.²² This was recognized to follow from Article 5 of the International Tin Council (Immunities and Privileges) Order of 1972 (the 1972 Order), which confers on the ITC 'the legal capacities of a body corporate'. Nevertheless, it was said, this article does not constitute the ITC as a discrete legal person under English law and the special attributes which it confers on the organization do not go so far as to deprive it of the essential nature of an unincorporated association—namely, that its acts are the acts of its members.

In order to determine whether the ITC possesses a discrete legal personality within the English legal system, separate and distinct from that of its member States, all of the five judges involved in the present proceedings attached special significance to Article 5 of the 1972 Order. The reason for this is clear. It is a well-established principle of the English legal system that treaties to which the UK is a party do not by themselves have the effect of creating new rules of English law. Consequently, Article 16(1) of the ITA and Article 3 of the Headquarters Agreement, although they might stipulate that the ITC shall have personality within the UK legal system, cannot by themselves bring that result about.²³ For such a thing to occur, legislation is necessary, be it primary or delegated,²⁴ and the relevant legislative act relating to the ITC is the 1972 Order. As Kerr LJ remarked, the Order is 'the only instrument presently in force which operates directly at the level . . . of the domestic or municipal law of the United Kingdom';²⁵ and it follows that, to ascertain whether the ITC is a legal person within the English legal system, the answer must ultimately be found in a proper understanding of that instrument, and, more particularly, in the interpretation of the formula laid down in Section 1(2) (a) of the International Organizations Act 1968, which is reproduced in Article 5 of the Order.²⁶

There, however, the consensus ended. For four of the five judges—Staughton and Millett JJ and Nourse and Gibson LJ—, it was unnecessary to look beyond Article 5 and its English law background in order to conclude that the ITC was thereby made a person of the English system. For the other one judge, Kerr LJ, it was necessary to go beyond exclusively English legal material and to examine the relevant treaty provisions relating to the ITC. Three of the first four judges—Staughton J and Nourse and Gibson LJ—relied on the latter material to provide an alternative ground for their judgments, though.

Under English law, if a number of people come together to achieve a common

²² For some of these attributes, see last year's volume of this *Year Book* at pp. 418–9 nn. 79–81 and p. 421 nn. 90–1; though note the comment in n. 81.

²³ Staughton J at pp. 682e and 702g.

²⁴ Staughton J at p. 687c and e; and Kerr LJ at p. 1075g; p. 291g. This does not necessarily mean that, without some such form of legislative intervention, an international organization cannot enjoy any form of existence within the English legal system. See last year's volume of this *Year Book* at pp. 408–9 nn. 30–4; and text at nn. 283–4, below.

²⁵ p. 1073h; p. 290b.

²⁶ p. 1056g; p. 275f–g.

purpose, the association which they form may be 'unincorporated': that is, no separate legal person is created, and the acts done in the name of the association are in law the acts of its members. Alternatively, their association may be 'incorporated' and a new legal person formed, separate and distinct from the members. Several means exist to form such an incorporeal legal person, the most familiar being incorporation as a registered company under the Companies Act.²⁷ The plaintiffs' argument was that, since Article 5 does not provide that the ITC is a 'body corporate', grant it the status of such an entity or stipulate that it should be deemed to be one, the ITC is not a discrete legal person under English law, there being no other form in which an incorporeal legal person might exist within the English legal system. It followed that the 'ITC' must be understood to be merely a collective name which is used for convenience by the member States when they act in pursuit of certain common ends laid down in the ITA.

Staughton and Millett JJ rejected this argument. Although the words 'corporation' and 'body corporate' are sometimes used to refer to the whole gamut of incorporeal legal persons known to English law,²⁸ these terms are more often used to refer to the particular subset of those entities formed by incorporated companies.²⁹ Consequently, the failure of Article 5 of the 1972 Order to confer on the ITC the status of a 'corporation' does not necessarily mean that that organization is not a person of the English legal system; for there are more forms in which an incorporeal legal person might exist at English law than that of a 'body corporate'—understanding that term in its second, narrower and more usual sense—and the ITC might have been constituted as one of these at the same time that it was denied the type of discrete legal existence which is enjoyed by an incorporated company.³⁰ To find out whether the ITC has been granted such a type of 'fictitious' legal personality, it was, therefore, necessary to proceed to interpret in more detail the formula used in Article 5.³¹

The plaintiffs contended that, although Article 5 of the 1972 Order in Council grants the ITC capacities under English law—namely, those which are enjoyed by a 'body corporate' (in the narrow sense of that phrase)—, this does not thereby make of that organization a legal person which is separate and distinct from its member States. Millett J summarized the argument thus: 'legal personality, in the sense of separate legal existence, is something different from, and more than, legal capacity';³² and, as Staughton J observed, Article 5 'does not . . . in terms grant [the ITC] legal personality'.³³

The plaintiffs' argument requires some explanation. One of the capacities which

²⁷ See last year's volume of this *Year Book* at pp. 409–10 nn. 36–7.

²⁸ See, e.g., Blackstone's *Commentaries on the Laws of England* (15th edn., 1809), Book 1, at p. 472.

²⁹ Thus, throughout his judgment, Staughton J referred to the incorporated company as 'a corporation or body corporate strictly so called', distinguishing it from the greater range of incorporeal legal persons which is embraced by those terms when they are used in their broader sense: pp. 692c, 693g and 694h.

³⁰ Thus, Staughton J remarked that 'Parliament might create an association with separate legal personality, without making it a corporation or body corporate in the strict sense': p. 693g; and see p. 694h. Millett J held likewise at p. 713g.

³¹ pp. 693g and 695d.

³² p. 710h.

³³ p. 692b.

a 'body corporate' enjoys under English law is to hold property in its own right, such that its property is in law separate from that of its members. Since the ITC has been accorded capacities of the type possessed by a 'corporation', it too must be able to hold property of its own, distinct from that held by its member States; yet if, as the plaintiffs maintained, the ITC is not a discrete legal person, it follows that there is no legal person other than the member States themselves in which property held in the name of the ITC can vest. The plaintiffs attempted to reconcile these two apparently conflicting propositions by contending that, rather than making the ITC into a discrete legal person, Article 5 should be understood to create a distinction between the capacities in which the member States of the ITC must be seen to act. When that article confers on the 'ITC' 'the legal capacities of a body corporate', the term 'ITC' must be understood as a collective name referring to the member States in their capacity as members of that organization, as distinct from those same States in their individual capacities. Consequently, when it is said, as a consequence of Article 5, that the ITC has the ability to hold property in its own right, this must be understood to mean that the member States of the ITC have thereby been enabled to hold property in their capacity as members of that organization, which property is distinct in law from the property held by them in their individual capacities.³⁴ This ingenious argument enabled the plaintiffs to give some content to Article 5, while, at the same time, allowing them to contend that the ITC remains an unincorporated association, albeit one with certain unusual features.³⁵

Since the 1972 Order grants the ITC the legal capacities of a body corporate, the ITC has the power to contract in its own right, and, assuming, as before, that the ITC is not a separate legal person, it follows, by virtue of the argument outlined above, that it is in truth the member States in their capacities as members which are vested with this power. Persons contracting with the ITC can, therefore, enforce their contractual rights by proceeding against the ITC in its own name—that is, against the member States in their capacity as members of the ITC—and any judgment which they then obtain against the ITC in that name, since it will in fact be a judgment against the member States *qua* members, should be recoverable solely from the property held by those States in that capacity—that is, from the property held in the name of the ITC.³⁶ At the same time, however, the plaintiffs contended that, since the ITC remains an unincorporated association, it should also possess the most essential feature of such a body: namely, that acts done in the name of the association impose direct and unlimited liabilities on its members. Contracts concluded in the ITC's name should, therefore, be understood to

³⁴ There is some authority for the existence within the English legal system of entities of this sort, which, while they are unincorporated associations and thus do not constitute legal persons separate and distinct from their members, nevertheless do possess some of the features normally associated with the possession of an independent legal personality: see the judgments of Lords MacDermott, Keith and Somervell in *Bonsor v. Musicians' Union*, [1956] AC 104, [1955] 3 All ER 518; though note Lord Wedderburn's criticisms of their Lordships' judgments, *Modern Law Review*, 20 (1957), p. 105.

³⁵ The plaintiffs often described the ITC as a partnership, rather than as a simple unincorporated association. Under English law, certain unincorporated associations are classified as partnerships under the Partnership Act 1890, and, as such, they enjoy certain special attributes under that Act and RSC Ord 81. However, the ITC could not be classified as a partnership, since its membership exceeds the statutorily defined limit of twenty and it does not fall within any of the exceptions which are made to this ceiling. See Kerr LJ at p. 1084g; p. 298h.

³⁶ See the concession made by Maclaine Watson in *Maclaine Watson & Co. Ltd. v. International Tin Council*, noted in last year's volume of this *Year Book* at p. 418 n. 79.

commit the member States in their individual capacities as well as in their capacity as members of that organization.³⁷ Consequently, the ITC's co-contractors have the option of proceeding against the member States *qua* individuals, as well as of proceeding against them *qua* members of the ITC; and, if they choose to follow the former route to enforce their contractual rights, any judgment which they obtain, since it will be given against the member States in their individual capacities, should be capable of being satisfied out of the property which those States hold in their own right, rather than merely out of the property held by them in the name of the ITC.

Both Staughton and Millett JJ at first instance and Nourse and Gibson LJ on appeal rejected the plaintiffs' argument, finding that Article 5 of the 1972 Order in Council, when given its natural and ordinary meaning, did not admit of such an interpretation. Gibson LJ held that, whereas the plaintiffs read that article as if it conferred the legal capacities in question upon the member States, in fact, 'the terms of the 1968 [International Organizations] Act indicate that it is on the designated organisation and not on the members that capacities and immunities are to be conferred'.³⁸ The 1968 Act thus envisages that, when the power conferred under Section 1(2) (a) is exercised and a grant is made to an international organization of the legal capacities of a body corporate, it is in an entity which is separate and distinct from the members of the organization that those legal capacities are vested; and, if that entity is to enjoy legal capacities of its own, then it necessarily follows that it is a discrete legal person. Since it was issued under the 1968 Act, the Order of 1972 could not but follow the pattern therein laid down and produce the above-mentioned result in respect of the ITC.

Although he considered it 'significant', Millett J did not share Gibson LJ's conviction that this factor could be regarded as 'decisive';³⁹ for it is possible to contend, as the plaintiffs did,⁴⁰ that this argument assumes the very thing which is to be proved: namely, that 'the organization' in which the legal capacities are said to vest is, in law, something separate and distinct from the members of which it is composed. Gibson LJ himself was alive to this charge of circularity and went on to support his conclusion by means of additional arguments drawn from beyond the text of Article 5.⁴¹ Millett J, however, felt able to reject the plaintiffs' allegations while relying 'simply on the language of article 5 of the 1972 order, which in my judgment is plain and unambiguous'.⁴² As he observed, the 'decisive' factor in the wording of that article is that it grants to the ITC the legal capacities 'of a body corporate'.⁴³ This phrase has not just a descriptive but also a predicative sense: that is, Article 5 does not just grant the ITC certain capacities the identity of which can be ascertained by examining the legal capacities under English law which a body corporate enjoys; it also makes of the organization, in respect of its capacities—but not in any other regard—, a body corporate and thus 'an artificial legal

³⁷ Some support for this argument can be found in the judgments in *Bonsor v. Musicians' Union*, referred to in n. 34 above. See, however, the comment in last year's volume of this *Year Book* at p. 419 n. 81.

³⁸ p. 1134a-b; p. 339b-c.

³⁹ p. 712h.

⁴⁰ See Gibson LJ's judgment at p. 1134b-c; p. 339c.

⁴¹ For which, see the text at nn. 62-70, below.

⁴² p. 713c.

⁴³ p. 712h.

entity distinct from its members'.⁴⁴ The 1972 Order must, therefore, be considered to 'create an artificial legal entity with all the characteristics and attributes of a body corporate, and thus a body corporate in all but name, [though] without making it one'.⁴⁵

Like Millett J and Gibson LJ, Staughton J and Nourse LJ based their conclusion that the ITC is a discrete legal person in English law on the proper interpretation of the text of Article 5. Neither of them, however, made clear the reasoning which led them to this conclusion. Considering it 'unnecessary to look beyond the terms of article 5 itself', Nourse LJ merely stated that 'a provision which gave the ITC the legal capacities of a body corporate would, as an inevitable consequence, give it separate personality in English law'.⁴⁶ He went on to note that, if the ITC is accorded legal capacities, then it must necessarily be a legal person: 'debeo, ergo sum'.⁴⁷ At no point, however, did he explain why he considered the grant of capacities in Article 5 to be made to the ITC as an entity separate from its member States rather than to the member States themselves—or, in the terms of the aphorism, why it was right to think of the ITC as the first person singular referred to by the verb 'debeo'. Staughton J's interpretation of Article 5 reflects the conclusion reached by Millett J: namely, that, 'in its dealings with others, and in particular when considering the effect of contracts that it may make, [the ITC] is to be treated as if it were a body corporate';⁴⁸ and, like a 'body corporate', the ITC must, therefore, be deemed to possess a legal personality of its own, separate from those of its member States. However, Staughton J did not explain why the formula embodied in Article 5 should be considered to have brought such a result about.

⁴⁴ p. 712i.

⁴⁵ p. 713g. The impression might be gained that Millett J did not attach vital importance to the words 'of a body corporate' in Article 5, and that, if the 1972 Order had granted the ITC legal capacities *simpliciter*, he would still have held the ITC to be a legal person. He thus emphasized the proposition that the existence of a discrete legal person follows necessarily from the existence of rules of law which recognize an entity to enjoy legal capacities and so to be capable of being the subject of legal rights and duties: pp. 711d, 712a, 712f and 713b; and see Kerr LJ at p. 1080a–e; p. 295b–e. While this proposition may be true, it could hardly be decisive of the present case; for the very question before the court was the identity of the entity or entities which are vested with the capacities granted by Article 5. Millett J himself recognized this, eschewing the argument favoured by Gibson LJ that, since Article 5 grants legal capacities to 'the Council', the ITC must be a discrete legal person. Since he had already held that a legal person exists if a rule of law recognizes it to possess legal capacities, Millett J must have refused to adopt this argument for the reason that he considered the words 'the Council' to be capable of referring to the member States themselves, so as to endow them with the legal capacities conferred by Article 5, rather than presupposing an entity distinct from the members in which those capacities were to vest. Moreover, he attached pivotal importance to the fact that, under Article 5, 'the ITC is given, not legal capacity or full legal capacity tout court, but specifically the legal capacities of a body corporate': p. 712h. In so far as the 1972 Order confers legal capacities on the ITC, Millett J thought it did not necessarily follow that the organization is thereby constituted a discrete legal person: those capacities might well be vested in its members, rather than in a discrete legal person representing the organization. However, in so far as the ITC is granted the legal capacities 'of a body corporate', the ambiguity otherwise inherent in Article 5 is removed, since it is thereby indicated that the capacities in question are to vest in a legal person which is separate and distinct from the members of the organization, as occurs in respect of a 'body corporate'.

⁴⁶ p. 1128h; p. 334j.

⁴⁷ p. 1129a; p. 335a. For the sense of this aphorism, see n. 45, above. At one point, Kerr LJ appears to have doubted the proposition embodied in this aphorism: p. 1080a–b; p. 295b. However, for the proper interpretation of this passage of his judgment, see text at n. 49, below. See also p. 1084c–d; p. 298e.

⁴⁸ p. 695h–i.

Of the five judges involved in the present cases, only Kerr LJ rejected the notion that the very wording of Article 5 makes it plain that the ITC is thereby constituted a discrete person of the English legal system. Despite the reasons adduced by Millett J, he held that it was nevertheless possible to interpret that article as vesting the legal capacities of a body corporate in the members of the ITC rather than in a discrete legal person representing their organization.⁴⁹ He consequently thought it necessary to go beyond the words used in Article 5 to determine which of these two interpretations is correct. Indeed, it is notable that, in spite of their assertions that their conclusions could be justified simply by reference to the wording of Article 5, both Staughton J and Gibson LJ—though not Millett J or Nourse LJ⁵⁰—advanced further arguments to bolster their judgments.

One factor which was thought to militate against the interpretation of Article 5 advanced by the plaintiffs was the difficulty of reconciling that view of the legal nature of the ITC with the English law of State immunity. If the ITC were not a discrete legal person under English law, then someone who contracted with 'the ITC' would in fact be entering into an agreement with each and every one of the States members of that organization, as has already been pointed out. It would, therefore, be against the member States that the organization's co-contractor would have to proceed if it wished to enforce its rights. Although foreign States members might raise a plea of State immunity to bar any such suit, nowadays such a plea would not be capable of preventing the enforcement of contractual rights against them, the immunity to which a State is entitled under English law having recently been subjected to severe limitations.⁵¹ However, prior to the mid-1970s, the immunity of States under English law was absolute and would therefore have precluded the adjudication of a suit against the foreign States members of an international organization. Consequently, if the plaintiffs' contention as to the legal nature of the ITC were correct, it would have followed that, from 1956, when the first order in council issued in relation to the ITC granted it, like the 1972 Order,

⁴⁹ p. 1080d; p. 295e. Later in his judgment, Kerr LJ appears to have been moved by the consideration that Article 6(1) of the 1972 Order confers immunities on 'the Council', rather than on the member States (pp. 1083h–1084a; p. 298c–d)—an argument similar to that advanced by Gibson LJ in relation to Article 5. However, there were several additional factors relating specifically to Article 6(1) which made it more difficult to read the words 'the Council' in that provision as a reference to the member States: see text at nn. 62–70, below.

There is some evidence that Kerr LJ thought Millett J to have held that, simply because Article 5 confers legal capacities on 'the Council', the ITC is a discrete legal person, distinct from its members. This would be to misunderstand Millett J's reasoning. Despite Kerr LJ's remarks to the contrary (p. 1080a–b; p. 295b), Millett J recognized that it is jurisprudentially possible to argue that a provision such as Article 5 confers legal capacities on the members of an unincorporated association without thereby making of that association a discrete legal person, separate from its members. Thus, it was an essential step in his reasoning to demonstrate that the words 'the Council' in Article 5 are used to mean an entity distinct from the member States, rather than simply being used as a collective name for the member States themselves: see n. 45, above.

⁵⁰ Nourse LJ might be thought to hint that international law substantiated his conclusion: p. 1128h; p. 334j. Millett J, however, made no such suggestion: p. 713c.

⁵¹ The scope of the immunity to which a State is entitled at common law was drastically reduced by the decisions in *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, [1977] QB 529, [1977] 1 All ER 881, and *I Congreso del Partido*, [1983] AC 244, [1981] 2 All ER 1064. (See also *Philippine Admiral (Owners) v. Wallem Shipping (Hong Kong) Ltd.*, [1977] AC 373, [1976] 1 All ER 78.) State immunity is no longer regulated by common law but by the State Immunity Act 1978. This statute, while it grants States immunities from suit and from enforcement, simultaneously limits the scope of these immunities quite drastically.

'the legal capacities of a body corporate',⁵² until the mid-1970s, when the law on State immunity changed and assumed its present restrictive form, contracts concluded with the ITC were, practically speaking, unenforceable.⁵³ In Kerr LJ's view, such a result was unacceptable, pointing to the erroneousness of the plaintiffs' argument.⁵⁴

Notwithstanding his observation that such 'historical considerations are bound to cast doubts on the soundness of [the plaintiffs'] submission . . . long before one comes to consider it in detail',⁵⁵ the unacceptability of the situation described by Kerr LJ is not immediately apparent once it is remembered that, until the mid-1970s, anybody who entered into a contract with a foreign State found himself in precisely the same position at English law. It would, therefore, hardly have been altogether strange if persons contracting with the ITC had found themselves unable to enforce their contractual rights. Kerr LJ, however, pointed to two additional factors which, he considered, made such a situation unacceptable in the present case. The first was that the problems which would have flowed from the unenforceability of contracts concluded with the ITC would have been much more serious than those which had normally resulted from the doctrine of absolute State immunity. One of the main functions of the ITC throughout its history has been to operate a buffer stock in order to seek to influence and control the world price of tin; and, to this end, it is inevitable that the ITC has to enter into contracts to buy and sell tin 'on a very large scale', and it is also likely that it might have to engage in 'heavy borrowing' to finance some of these transactions.⁵⁶ The unenforceability of their rights under such contracts would, therefore, have posed the organization's creditors with problems of an altogether different scale from those normally arising for a person or company contracting with a foreign State.⁵⁷ The second factor which led Kerr LJ to refuse to contemplate the application of the doctrine of absolute State immunity to the ITC's contracts was the exposed position in which this would have left the UK Government.⁵⁸ Assuming the plaintiffs' view of the nature of the ITC, the UK, as a member of that organization, would be liable on the contracts which were concluded in its name. Unlike the foreign States members, however, it would not enjoy any immunity from suit in the English courts by virtue of the doctrine of State immunity. If the UK's liability were merely joint in nature, then, until the mid-1970s, the absolute immunity of the other member States

⁵² International Organizations (Immunities and Privileges of the International Tin Council) Order 1956, SI 1956/1214. The formula in dispute, as it was used in this Order, presumably had the same meaning as it did when used in the 1972 Order, if the plaintiffs' contention were correct. Indeed, the plaintiffs argued that the formula had the same meaning as was urged on the court when it was first used in relation to international organizations in the Diplomatic Privileges (Extension) Act of 1944. See text following n. 92, below.

⁵³ It is worth adding that, under the law as it then stood, even if a State agreed to a term of a contract in which it consented to waive its immunity, such a waiver would be ineffective and the State's immunity would remain intact. The obligation assumed by the ITC in Article 23 of its Headquarters Agreement to insert arbitration clauses in the contracts into which it enters (see n. 6, above) would, therefore, have had little point.

⁵⁴ pp. 1061h-1062d and 1083g-h; pp. 279g-280b and 297j-298b.

⁵⁵ p. 1062d; p. 280b.

⁵⁶ See, e.g., Articles 21 and 24 of the ITA.

⁵⁷ pp. 1061h-1062a; p. 279h.

⁵⁸ Oddly, Kerr LJ did not consider the exposed position in which the plaintiffs' argument would also have left the EEC, which, like the UK Government, does not enjoy jurisdictional immunity under English law: see text at nn. 413-34, below.

would still have drastically curtailed the ability of the organization's co-contractors to enforce their rights. If, however, the UK's liability were several, then the absolute immunity of the foreign States members would have caused the UK to be left alone to face liabilities running possibly into hundreds of millions of pounds.⁵⁹ Moreover, and whatever the nature of its liability, it might be asked why the position of this one member State should have been so different from that of the others.⁶⁰ This 'strange result' to which it would have led prompted Kerr LJ to characterize the plaintiffs' interpretation of Article 5 as 'highly unlikely'.⁶¹

However, Kerr LJ's argument still lacks cogency. His reasoning presupposes that, if the plaintiffs' argument were to prevail, any questions of immunities from suit and enforcement arising in respect of the ITC's transactions would fall to be dealt with by reference to the law of State immunity. Yet it is clear from the International Organizations Act that the immunities which are to apply in respect of the activities and transactions of the organizations which come under its aegis are to be regulated by orders in council issued under that Act; and the Order of 1972 contains just such a provision in Article 6. The situation was the same under the International Organizations (Immunities and Privileges) Act of 1950, under which orders in council were issued relating to the ITC in 1956 and 1961. Consequently, the argument based on the common law of State immunity is misplaced, since that law was never applicable to the activities of the ITC or of any other international organization.

Nevertheless, the law relating to the immunities of the ITC did present problems for the plaintiffs' interpretation of Article 5—problems which weighed with several of the judges involved in the present litigation.

Section 1(2)(b) of the International Organizations Act envisages that the immunities which might be conferred under that statute will be granted to 'the organization'. Article 6(1) of the 1972 Order in Council relating to the ITC accordingly provides that it is 'the Council' which is to enjoy the immunities bestowed therein. If the plaintiffs' interpretation of Article 5 were correct, then these provisions would be redundant, since there would be no discrete legal entity distinct from the member States and representing the organization on which to confer any immunities.⁶² They only have point if such an independent legal person is created by the use of the formula contained in Section 1(2)(a) of the Act and reproduced in Article 5 of the Order. This problem mirrors that raised by the fact that Article 5 confers legal capacities upon 'the Council', rather than upon its member States, and the plaintiffs sought to avoid it in much the same way: just as the words 'the Council' in Article 5 should be understood as merely a convenient way of referring to the member States of the ITC, rather than to any legal person independent of them, the same should be done with Article 6(1), which should, therefore, be read to regulate the immunities enjoyed by the member States of the ITC.⁶³

⁵⁹ pp. 1062c and 1083g; pp. 279j and 298a. At the same time, that doctrine, together with the doctrine in *Cook v. Sprigg* (as to which, see n. 360, below), would have forced the UK Government to rely on diplomatic channels to obtain help from its fellow members in meeting these liabilities.

⁶⁰ p. 1062c; p. 280a.

⁶¹ p. 1083h; p. 298b.

⁶² Kerr LJ at pp. 1083h–1084a; p. 298c.

⁶³ If the plaintiffs were correct in thinking that, if the ITC were not a distinct legal person, then persons contracting with the organization would be able to proceed against the member States either in their capacity as members or in their individual capacities, then it would follow that the reference to 'the Council' in Article 6(1) would need to be read somewhat differently from the identical reference in

While it is possible to make a plausible case that the words 'the Council' in Article 5 of the 1972 Order should be read so as to refer to the ITC's member States, such an argument is more difficult to sustain in respect of Article 6(1). Section 1(2)(b) of the 1968 Act would then empower the grant to the States members of an international organization of immunity from legal process before the UK's courts, and the chapeau to Article 6(1) of the 1972 Order would effect such a grant to the members of the ITC. However, in so far as both of these provisions would then envisage the vesting of immunities in foreign States, they would have been redundant, at least at the time they were drafted; for, as Kerr LJ pointed out, foreign States already enjoyed complete immunity from suit and enforcement under the common law rules on State immunity as they then stood.⁶⁴ This charge of redundancy might be avoided if, rather than empowering the grant of superfluous new immunities, Section 1(2)(b) were construed to create a power to vary and restrict the immunities to which foreign States members of an organization were otherwise already entitled under English law.⁶⁵ However, all of the three judges who considered the matter—Staughton J and Kerr and Gibson LJ—found it difficult to accept the notion that the 1968 Act had created a power to do something as significant—and, at that time in English law, as unusual—as stripping foreign States of their immunity without expressly stipulating that this was to be the effect of orders made under its aegis.⁶⁶

Article 5. The plaintiffs suggested that the latter provision be read so as to confer the legal capacities described on the member States solely in their capacity as members of the ITC. If Article 6(1) was read in this way, then it would only make the member States immune from suits brought against them in that same capacity, leaving the ITC's co-contractors free to circumvent those immunities by the expedient of enforcing their contracts against the member States in their individual capacities. If Article 6(1) were, therefore, to serve any useful purpose in protecting the member States against suit for transactions concluded in the name of the ITC, it would have to be interpreted to protect the member States against the latter type of action as well as the former. This would entail a correspondingly wider reading of 'the Council' than that given to the same words in Article 5.

⁶⁴ p. 1084b; p. 298d. Such redundancy would have ceased upon the incorporation into English law of the doctrine of restrictive State immunity, since it then would have become necessary on certain occasions to invest foreign States with immunities to which they are not entitled under that doctrine. However, in so far as Section 1(2)(b) and Article 6(1) would even then have invested foreign States with certain immunities to which they were already entitled *aliunde*, problems would still have remained: see n. 66, below.

⁶⁵ In the light of the subsequent incorporation into English law of the doctrine of restrictive immunity, Section 1(2)(b) should now, on this argument, be read to confer a power both to remove immunities to which States are entitled under that doctrine and to confer immunities to which that doctrine does not entitle them. However, the argument below remains equally applicable to the section when so construed.

It may be added that it would be necessary to interpret Section 1(2)(b) in the manner suggested not only to avoid the charge of redundancy described in the text, but also to give effect to Section 1(6)(a) of the 1968 Act, since there must have been a power to strip foreign States of the absolute immunity to which they were otherwise then entitled if the organization to which they belonged was to enjoy only those immunities which the UK was under a treaty obligation to confer on it. Indeed, such a power would have continued to be necessary even after English law changed to incorporate the doctrine of restrictive immunity, since it might have been necessary to remove some of the immunities to which States are entitled even under that doctrine in order to ensure compliance with Section 1(6)(a).

⁶⁶ Staughton J at p. 695e; Kerr LJ at p. 1084c; p. 298d; and Gibson LJ at p. 1134c-c; p. 339d-f.

A further problem with the plaintiffs' interpretation of Section 1(2)(b) is that the 1968 Act envisages that the immunities enjoyed by international organizations are to have their origin in the orders made under that statute, whereas, according to the plaintiffs' argument, at the time the 1968 Act was passed, the immunities enjoyed by organizations had their source in the common law rules on State immunity, and it was the restrictions on those immunities, rather than the immunities themselves, which found

Admittedly, the plaintiffs' contention would not make Section 1(2)(b) of the 1968 Act and Article 6(1) of the 1972 Order totally redundant: the UK obviously does not benefit from State immunity before its own courts and it would not, therefore, have been superfluous at the time these provisions were enacted to empower or to make a grant of immunity to that State.⁶⁷ Indeed, even if this were their sole purpose at the time they were enacted, the legislation of these provisions would have been comprehensible, since the UK would have needed to enjoy immunity if it was not to be placed in the invidious position, described above, of being the only member of an international organization which might be sued for the debts of the organization.⁶⁸ However, just as the courts found it difficult to understand Section 1(2)(b) and Article 6(1) as regulating the immunities of foreign States, so they found it difficult to accept that those provisions regulate immunities to which the UK Government is to be entitled. For the UK Government to be immune from suit before its own courts is a fairly unusual thing to occur,⁶⁹ and Staughton J and Gibson LJ thought it difficult to hold that the 1968 Act had empowered the Crown to produce such a significant result, or that the 1972 Order had brought such a result about, in the absence of any express provision to that effect.⁷⁰

The courts thus derived assistance in interpreting Article 5 of the 1972 Order from its background in English law—Article 6 of the Order, the International Organizations Act, and the law relating to the immunity of both foreign States and the UK Government itself.⁷¹ At the same time, several judges also had resort

their origin in the orders in council issued under the Act. Section 1(6)(a) thus refers to the privileges and immunities 'conferred by' the orders made under Section 1(2), while Section 1(2)(b) provides that an organization is to enjoy immunities only 'to such extent as may be specified in the [relevant] Order', it following that, in the absence of any provision relating to immunities in the relevant order, an organization is to enjoy no immunities whatsoever.

⁶⁷ Section 1 of the 1968 Act applies only to organizations of which the UK is a member (Section 1(1)(a)), so that orders granting immunities under Section 1(2)(b) would never be completely redundant, even if the plaintiffs' argument was accepted. Moreover, in the case of the ITC and the other organizations of which it is a member, it would not be redundant to confer immunity on the EEC: see text at nn. 413–34, below.

⁶⁸ It should also be added that Section 1(6)(b) of the 1968 Act would not prevent such a grant of immunity being made to the UK Government, since this provision only prohibits the grant of immunities to officials representing the UK at the organization and does not prohibit such grants to the UK Government itself.

⁶⁹ Though not impossible. The Crown was immune from suit at common law until the supervention of the Crown Proceedings Act in 1947, and certain governmental undertakings still enjoy immunity today by virtue of certain statutory provisions.

⁷⁰ Staughton J at p. 695c; and Gibson LJ at p. 1134c–e; p. 339d–f; and cf. Kerr LJ at p. 1062c; p. 280a. While Gibson LJ did not refer to the UK Government, his reasoning is equally applicable to attempts to construe the 1968 Act as empowering the grant of immunity to it.

⁷¹ Kerr LJ also relied on Lord Pearson's dictum in *Attorney-General v. Nissan*, [1970] AC 179 at p. 223, [1969] 1 All ER 629 at p. 647, that the order in council issued in 1947 under the Diplomatic Privileges (Extension) Act 1946, which used the same formula as Section 1(2)(a) of the 1968 Act and Article 5 of the 1972 Order, constituted the United Nations a person of English law: pp. 1082f–1083d; p. 297c–h.

While he used arguments drawn from Article 6 of the 1972 Order, Staughton J characterized the help which he got from that provision as 'slight': p. 695d. Indeed, he felt it difficult to use that article to assist in the interpretation of the words 'legal capacities of a body corporate', since, while these same words had appeared in the orders relating to the ITC which were issued in 1956 and 1961, those instruments had not contained any provision on the lines of Article 6, in spite of the fact that a power to grant immunities was contained in Section 1(2)(a) of the International Organizations (Immunities and Privileges) Act 1950: p. 695g. This is peculiar reasoning. The provisions of the 1972 Order should be presumed to form a coherent whole, and Article 6 should, therefore, be capable of throwing light on the meaning of Article 5, whatever the content of previous orders in council. Moreover, since the 1950 Act,

to arguments based on international law, and, in particular, the well-known principle of English law, expounded in *Salomon v. Customs and Excise Commissioners*,⁷² that statutes should be construed wherever possible so as not to put the UK in breach of its treaty obligations. However, the judges who relied on this principle differed markedly in the importance which they accorded it.

As normally understood, this principle is of assistance only when the words of a statute are ambiguous and admit of at least one interpretation which, if given effect, would put the UK in breach of its treaty obligations while, at the same time, allowing of at least one other interpretation which would not have such a consequence.⁷³ The principle is, therefore, of no help where the meaning of the disputed words is clear on their face: effect must then be given to that meaning, regardless of whether it is consistent⁷⁴ or not⁷⁵ with the UK's treaty obligations.⁷⁶ For two of the judges who relied on the principle in the present proceedings, the meaning of the formula in Article 5 was indeed clear on its face. The principle afforded simply an alternative basis for their conclusions, it being necessary to have recourse to it only if, contrary to their belief, some doubt remained as to the proper interpretation of Article 5 when that article was read by itself. This is unremarkable. Worthy of note, however, is the fact that, as an alternative basis for their decisions, the principle played a secondary role only. Assuming the meaning of Article 5 to be unclear if that provision was read in isolation, the two judges relied first and foremost on its background in English law. This they thought to establish its correct interpretation; and it was only if, contrary to their opinion, this material still left the issue in doubt that they had recourse to the principle in *Salomon's* case. Thus Gibson LJ held the effect of Article 5 to be clear 'from the language used both in the [1968] statute and in the [1972] order',⁷⁷ adding that '[a]ny doubt' which might remain 'would be set at rest' by an examination of the background to that article in international law.⁷⁸ Similarly, Staughton J reached his conclusion on the basis of the

like the 1968 Act, envisaged that an international organization might enjoy immunities from suit while at the same time possessing 'the legal capacities of a body corporate', it was presumably the case that the formula which now appears in Article 5, when it appeared in an order issued under the 1950 Act, bore a meaning consistent with a simultaneous grant of immunities being made to the organization the subject of that order, even if no such grant was in fact made to it.

⁷² [1967] 2 QB 116, [1966] 3 All ER 871. Kerr LJ referred to the judgment of Diplock LJ in this case as authority for the principle cited in the text, together with the judgment of Lord Diplock in *Garland v. British Rail Engineering Ltd.*, [1983] 2 AC 751, [1982] 2 All ER 402: p. 1076h; p. 292f. See also Gibson LJ at p. 1137h; p. 342d.

⁷³ See, e.g., the judgment of Scarman LJ in *Pan-American Airways Inc. v. Department of Trade*, [1976] 1 Lloyd's Rep 257 at p. 261, quoted by Kerr LJ (p. 1077b-d; pp. 292h-293a) and cited by Gibson LJ (p. 1137h; p. 342d). See also Gibson LJ's formulation of the principle at pp. 1137h-1138b; p. 342e. Kerr LJ thought it possible to refer to the treaties relating to the ITC 'given the problems and uncertainties of interpreting the Order in Council of 1972': pp. 1076h-1077a; p. 292g.

⁷⁴ Reliance on the principle would then be supererogatory.

⁷⁵ Gibson LJ at p. 1138a; p. 342e; and Nourse LJ at p. 1128h; p. 334j.

⁷⁶ The principle is also of no assistance where the meaning of the disputed words is unclear but they do not admit of any construction consistent with the UK's treaty commitments.

⁷⁷ p. 1132h; p. 338d. See also pp. 1134a-b and 1136e; pp. 339c and 341b.

⁷⁸ pp. 1132h-1133a; p. 338d. Gibson LJ termed this background 'the legislative history' of the formula in Article 5: loc. cit. and p. 1136f; p. 341c. However, the greater part of this 'history' was in fact contained in international legal materials.

wording of Article 5 alone,⁷⁹ corroborated it by reference to Article 6,⁸⁰ and then referred to international law in order to make his conclusion 'firm'.⁸¹ In marked contrast, Kerr LJ based his judgment squarely on arguments derived from international law. Unlike his peers, Kerr LJ did not think the meaning of Article 5 to be clear on its face,⁸² and resort to elements beyond the text of that article therefore played a vital part in his conclusion.⁸³ Moreover, he had recourse, first and foremost, to the principle in *Salomon's* case,⁸⁴ and, while he put store on Article 5's background in English law, the role of the arguments which he drew from that material was secondary and supplementary.

These differences in approach reveal a measure of disagreement about the role of the principle in *Salomon's* case. For Staughton J and Gibson LJ, the disputed words of a statute should first of all be read in their English law context—that is, in the context of the relevant enactment as a whole, together with any parent legislation, plus its background in English law, both statutory and common law. Only if this material fails to resolve the problem should resort be had to arguments based on international law. For Kerr LJ, on the other hand, it is permissible to go straight to the principle in *Salomon's* case once the disputed words, considered in isolation, are found to be unclear on their face. It is not necessary first to try and fail to establish a clear interpretation of those words by looking to their English law background. Kerr LJ's approach attaches greater importance to ensuring the UK's compliance with its treaty obligations, and, for this reason, is to be welcomed as mitigating the operation of the principle that treaties are not as such part of 'the law of the land'. Nevertheless, it might be unwise to assume that Kerr LJ's 'internationalist' approach is generally applicable wherever a statute calls for interpretation and relevant treaty obligations exist. Thus, in having recourse to the principle in *Salomon's* case, Kerr LJ laid stress upon the 'peculiarly international context' of the present proceedings,⁸⁵ springing from the fact that they relate to an international organization, and 'since such organisations are created on the plane of public international law, the starting point must equally be on this plane'.⁸⁶

Article 16(1) of the ITA and Article 3 of the Headquarters Agreement impose an obligation on the UK to constitute the ITC as a legal person within the English

⁷⁹ p. 695h. See also text at n. 48, above.

⁸⁰ p. 695d; and see text at nn. 62–70, above; though see n. 71, above.

⁸¹ p. 695i. Nourse LJ may have followed a similar path, though not relying on Article 6: see n. 50, above.

⁸² See text at n. 49, above.

⁸³ At one point, Kerr LJ's judgment gives the impression that he had recourse to international law first and foremost, without thinking it necessary, as a preliminary step, to establish that the meaning of the statutory words was unclear: p. 1056f and g; p. 275c and g. However, it is elsewhere apparent that, at least in dealing with the plaintiffs' first argument, he considered it a necessary precondition to applying the principle in *Salomon's* case that it first be established that the meaning of Article 5 is unclear on its face. He thus held that recourse should be had to that principle, 'given the problems and uncertainties of interpreting the 1972 order': pp. 1076h–1077a; p. 292g. See also p. 1080a–f; p. 295b–f.

⁸⁴ Kerr LJ's first and second reasons for holding Article 5 to constitute the ITC as a person of English law were both grounded in international law. For further evidence of the stress which Kerr LJ placed on international law, see text at nn. 260–82, below.

⁸⁵ p. 1076h; p. 292g.

⁸⁶ p. 1056f; p. 275e; and see p. 1056g–h; p. 275g. For certain further consequences which Kerr LJ drew from the ITC's international origins, see text at nn. 260–9, below.

legal system.⁸⁷ Consequently, in so far as it was possible to interpret Article 5 of the 1972 Order as making the ITC a discrete legal person at English law, separate and distinct from its members, Staughton J and Kerr and Gibson LJ agreed that this should be done in order to avoid putting the UK in breach of its obligations under those treaties.⁸⁸

The plaintiffs, however, contended that neither the ITA nor the Headquarters Agreement can be used to assist in the interpretation of Article 5. In 1972, when the present order relating to the ITC was issued, the Headquarters Agreement between the ITC and the UK had already been concluded.⁸⁹ Moreover, while the ITA was concluded many years after the Order was issued, there is, as Kerr LJ pointed out, no 'material distinction for present purposes' between that treaty and the fourth ITA, which was concluded in 1971, and it is thus possible to talk as if the enactment of the Order was subsequent to that treaty, too.⁹⁰ These facts notwithstanding, the plaintiffs contended that it is impossible to claim that Article 5 of the Order was drafted in order to give effect to the UK's obligations under those two treaties, since the formula which it embodies is the only one which the International Organizations Act 1968 makes available for defining the status of an international organization under English law; and, since that statute was enacted prior to the conclusion of both the ITA and the Headquarters Agreement, it is impossible to claim that Section 1(2)(a), which empowers the issue of orders containing the formula in dispute, was drafted with a view to the implementation of the UK's obligations under those two treaties.

Whilst this argument, if successful, barred reliance on the ITA and the Headquarters Agreement, it still left room for the use of some international legal materials in the interpretation of Article 5. The International Organizations Act 1968 and the powers conferred in it are clearly meant to be capable of being applied to most of the international organizations of which the UK is or might become a member, obviating the need for Parliament to pass a separate piece of legislation

⁸⁷ Gibson LJ alone thought it necessary to examine the meaning of these undertakings: p. 1138h; p. 343c. In so doing, it was the notion of legal personality within the international legal system which he considered, rather than the meaning of that concept within municipal systems of law: pp. 1138h, 1139b and d and 1141c-d; pp. 343c, e and f and 345c; and note his reliance on the judgment of the International Court of Justice in *Reparation for Injuries Suffered in the Service of the United Nations* (ICJ Reports, 1949, p. 174) at pp. 1140g-1141b; pp. 344h-345b. This might be thought a strange thing to do. The treaty undertakings in question are to constitute the ITC as a person of municipal law, as Gibson LJ himself noted: p. 1141c; p. 345d. Therefore, it might be argued, the meaning of 'legal personality' in those two treaties was to be found by referring to the significance of that concept in municipal legal systems and, in the case of the Headquarters Agreement, in English law itself. However, as Gibson LJ observed, the undertakings in question are contained in international agreements negotiated by international legal persons and governed by international law: p. 1138h; p. 343c. The concept to which the words 'legal personality' refer is, therefore, presumably the one current in international law, and the UK's obligation under those treaties is accordingly to implement in its own national legal system effects of the type which 'legal personality' has under international law. Gibson LJ thus displayed a welcome readiness not to read treaties as if they were English statutes, but to recognize that they are agreements concluded within a different legal system, which consequently fall to be read in the light of the concepts, usages and rules which are proper to that system.

⁸⁸ Staughton J at pp. 695i-696a; Kerr LJ at pp. 1081a-d and g; pp. 295j-296b and 296e; Gibson LJ at pp. 1137h-1138a, 1138c-d and 1141c; pp. 342e and g and 345d.

⁸⁹ Indeed, the Order mentions this treaty, incorporates some of its provisions and cross-refers to others, as Kerr LJ pointed out: pp. 1074a and 1176g; pp. 290c and 292e.

⁹⁰ p. 1064d-e; p. 281j. The fourth ITA was concluded in London on 29 January 1971: TS No. 91 (1971), Cmnd. 4831; *UN Treaty Series*, vol. 824, p. 229.

each time provision needs to be made for an international organization under English law. By 1968, it had already become 'standard practice' for the constituent treaties of international organizations to stipulate that they were to enjoy personality within the national legal systems of their member States.⁹¹ It is, therefore, reasonable to assume that the formula embodied in Section 1(2)(a) was designed to enable the UK to implement its obligations under those treaties, and it should be interpreted accordingly.⁹² The plaintiffs, however, attempted to block such an argument by precluding reference even to those treaties setting up international organizations which were concluded prior to 1968. Pointing to the fact that the formula in Section 1(2)(a) of the International Organizations Act reproduces verbatim the formula used in Section 1(2)(a) of the Diplomatic Privileges (Extension) Act of 1944—the earliest piece of legislation to make provision for international organizations in UK law—the plaintiffs contended that it must have the same meaning under the former statute as it did when it first appeared in the latter. Since the 1944 Act was enacted prior to the conclusion of the treaties referred to above, Section 1(2)(a) of that statute could hardly have been drafted to facilitate the implementation of the obligations imposed by those agreements. The meaning of the formula used in that provision should, therefore, be determined without the help of any international legal materials at all.

These arguments raised important questions as to the scope and application of the principle in *Salomon's* case. Staughton J found the principle sometimes to have been formulated as a presumption of legislative intention, stipulating that, when Parliament enacts a statute, it should be assumed to intend that the UK should not thereby be placed in breach of its treaty obligations.⁹³ Understood thus, it enjoins respect only for those obligations contained in treaties which were already concluded at the date of the enactment of the statute which falls to be construed;⁹⁴ for the legislature could hardly then have known of commitments contained in treaties

⁹¹ Kerr LJ at p. 1082b; p. 296h-j.

⁹² Kerr LJ at p. 1082e-f; p. 297b.

⁹³ p. 688a-d.

⁹⁴ This statement requires some refinement. The principle, thus understood, clearly applies in respect of obligations which were in force for the UK when Parliament gave its final reading to the statute. It also clearly applies in respect of obligations to which the UK had given its consent to be bound, even though they were not then in force for the UK. Moreover, if the statute was drafted specifically to implement a future treaty commitment, then it would not matter that that obligation was not yet in force for the UK nor that the UK had not yet consented to be bound by it—after all, passage of the statute might have been a necessary step to enable the UK to express its consent to be bound by that treaty. But what if the statute did not have this function, but merely touches upon the same subject-matter as the treaty? Should Parliament be presumed to have intended not to place obstacles in the way of the Government's later deciding that the UK should consent to be bound by that treaty? If so, should this be presumed only where the UK was involved in negotiating and adopting the text of the treaty or should it also be presumed in respect of a treaty which the UK did not negotiate but to which it is entitled to accede? And what of a statute which is enacted while the UK is actually involved in negotiating the text of a treaty? (On the last example, see the decision of Bingham J in *Standard Chartered Bank v. International Tin Council*, noted in last year's volume of this *Year Book* at pp. 399-406 nn. 17-19.)

It is worthy of note that, if the principle applies to the above-mentioned cases, then it enjoins that a statute be interpreted so as to be consistent with treaty obligations by which the UK had not consented to be bound at the time of that statute's enactment, by which the UK might not have consented to be bound at the time the statute falls to be interpreted, and by which the UK might never consent to be bound at any time in the future. It would, therefore, be only an approximate and somewhat imprecise characterization of the principle if it were described, as it often is, as stipulating that statutes be construed so as to avoid putting the UK in breach of its treaty obligations.

which were concluded at a later date, much less have intended to avoid putting the UK in breach of them.⁹⁵ At the same time, Staughton J also found that the principle is sometimes expressed in the form of a straightforward injunction to construe statutes in a way which avoids putting the UK in breach of its treaty obligations.⁹⁶ Understood in this second way, the principle makes relevant to the interpretation of a statute all treaties which impose obligations on the UK, no matter when they were concluded, be it prior to the enactment of the statute or subsequent to that date, as long as they touch upon the same subject-matter.

As Staughton J observed,⁹⁷ if the second interpretation of the principle is correct, then it is irrelevant that the formula reproduced in Article 5 of the 1972 Order has its origins in a statute enacted in 1968 before the conclusion of the ITA and the ITC's Headquarters Agreement, just as it is irrelevant that the formula embodied in the 1968 statute derives from another statute which was enacted in 1944 and which antedates the practice of incorporating into the constituent treaties of international organizations clauses which stipulate that those organizations are to enjoy personality within the legal systems of their member States: in each case, the subsequent treaties could be used to help interpret the anterior statute. It was this interpretation of the principle which Staughton J adopted, concluding: 'I ought to construe the 1972 Order in Council so as to conform with [the ITA] and the headquarters Agreement if I can'.⁹⁸

⁹⁵ See, in particular, the formulation of the principle made by Lord Diplock in *Garland v. British Rail Engineering Ltd.* (loc. cit. above (n. 72), at p. 771; p. 415), quoted by Gibson LJ at p. 1136h; p. 341f; and by Staughton J at p. 687h-i; and referred to by Kerr LJ at p. 1076h; p. 292f.

It should be emphasized that to espouse the formulation of the principle in *Salomon's* case as a presumption of legislative intention is consistent both with limiting the application of the principle to cases in which it is clear that the purpose of the statute is to implement a treaty and with applying that principle in a much broader fashion to statutes which have no such evident purpose but which simply deal with the same subject-matter as a treaty: Staughton J at p. 687g-h. There is adequate judicial authority to sustain both of these alternative interpretations of the scope of the principle: contrast, e.g., the judgment of Diplock LJ in *Salomon's* case itself, certain passages of which (p. 144a-f; p. 876a-e) lend support to the former, more restrictive version, with his words in the later case of *Garland v. British Rail Engineering* (loc. cit. above), which support the latter, broader reading. The second, wider interpretation has been assumed here. At the same time, and even if the wider version of the principle is to be preferred, it naturally strengthens the cogency of the presumption that a statute is intended to be consistent with the UK's actual or prospective treaty obligations if it is clear on the face of the statute or from attendant extrinsic factors that its purpose is to implement that treaty. Thus, in the instant case, while referring to authorities which support the broader interpretation of the principle (loc. cit. above (n. 73) and this note), Kerr LJ also laid stress on the fact that the 1972 Order expressly refers to, and necessarily requires consideration of, certain provisions of the ITA and the Headquarters Agreement, indicating its purpose to be to implement the UK's obligations under those treaties: see n. 110, below.

⁹⁶ Loc. cit. above (n. 93).

⁹⁷ p. 688h.

⁹⁸ p. 688h. In this passage, Staughton J framed the terms of his enquiry in an excessively narrow manner, suggesting that, to determine the effect of the 1972 Order, he needed only to consider its Article 5 and could ignore Section 1(2)(a) of the 1968 Act. However, as Kerr LJ pointed out (n. 115, below), orders in council issued under the 1968 Act, when they bestow on an organization 'the legal capacities of a body corporate', cannot give to that formula a meaning different from that which was fixed for it by the 1968 Act. Staughton J thus needed to construe Section 1(2)(a), and not just Article 5. Moreover, the 1968 Act is applicable to all international organizations of which the UK is a member, not just the ITC. Consequently, if the formula in Section 1(2)(a) is to be construed so as to avoid putting the UK in breach of its treaty obligations, it is hardly sufficient to accord it a meaning which respects the UK's obligations under the ITA and the ITC's Headquarters Agreement: it is necessary to go further and examine the UK's obligations under the constituent treaties of all the organizations of which the UK is a member so that, if possible, a meaning can be found for the formula which will avoid

Staughton J's conclusion is to be welcomed. If the principle in *Salomon's* case is to be treated as a presumption of legislative intention, as the first interpretation described above suggests, then there must be some reason for making the presumption prescribed—a reason, moreover, which must have nothing to do with the actual intention of Parliament, which, after all, is being presumed, rather than ascertained. The justification for making the stipulated presumption is that, if statutes were to be interpreted so as to put the UK in breach of its treaty obligations, then not only would the UK's credibility as a treaty-partner be eroded, but it might also incur onerous liabilities to make reparation to the State or States wronged by its breach as well as becoming a lawful target for their countermeasures.⁹⁹ However, if factors such as these justify construing statutes in a manner consistent with the UK's treaty commitments, then they militate in favour of doing so regardless of when the treaty imposing those obligations was concluded, even if it was subsequent to the enactment of the statute which falls to be construed. The first interpretation of the principle thus fails to give it a scope commensurate with that merited by the factors which justify its existence. At the same time, the first interpretation also gives the principle too wide an ambit, since it enjoins that a statute be interpreted to respect treaties which were concluded before the date of its enactment even though they might since have ceased to be binding upon the UK.¹⁰⁰ In marked contrast, the second version of the principle, preferred by Staughton J, respects both the positive and the negative demands of the maxim *cessat ratio, cessat lex*.¹⁰¹ Admittedly, interpreted in the second way described, the principle has the potential consequence that the effect of a statute might vary through time as the UK undertakes new treaty commitments and terminates existing ones, making relevant to the interpretation of a statute factors which were not pertinent at the time of its enactment and rendering irrelevant factors which formerly were pertinent. However, this is not something which needs to be avoided, since information as to the existence and the content of the UK's treaty commitments is publicly available,

putting the UK in breach of its obligations under any one of those treaties—or, if this is not possible, a meaning which minimizes the number and extent of its breaches. Staughton J engaged in just such a wide-ranging enquiry when considering the plaintiffs' second argument: see text at nn. 319–25, below. Nevertheless, in respect of the plaintiffs' first argument, it was, in fact, unnecessary to look beyond the ITA and the Headquarters Agreement. Most treaties relating to international organizations impose obligations similar to that found in these two agreements, and, since the remainder impose no obligations at all relating to the bestowal of legal personality, they could safely be ignored as irrelevant to the task in hand: see n. 116, below.

⁹⁹ Admittedly, the principle, even if interpreted in its widest possible sense, cannot prevent such things occurring: it might be impossible to read a statute in a manner consistent with the UK's treaty commitments; and, since treaties do not by themselves create rules of English law, the UK might find itself in breach of its undertakings if no statute has been enacted to ensure their fulfilment. However, 'half a loaf is better than no bread at all', and the bigger that 'half a loaf', the better.

It should be noted that, as commonly formulated, the principle in *Salomon's* case does not attach any significance to the content of the treaty commitment which it is prescribed that the statute should respect. The reasons for the principle which are suggested in the text therefore do likewise. Yet it might be thought that the principle should not be given much, if any, weight where a treaty imposes obligations whose content is unjust, immoral or contrary to public policy.

¹⁰⁰ Even, indeed, if the UK has never been bound by them at all: see n. 94, above.

¹⁰¹ The second interpretation of the principle is all the better founded in view of the fact that the goal of statutory interpretation in English law is not, as the first interpretation suggests, to ascertain the intention of Parliament, and that to formulate propositions, principles and rules in such terms is simply to employ a 'convenient metaphor', as Lord Diplock pointed out in *Fothergill v. Monarch Airlines Ltd.*, [1981] AC 251, [1980] 2 All ER 696, at p. 279f–g; p. 705a. See also Staughton J at p. 689f–g.

enabling individuals to plan their affairs and adjust their conduct as a statute undergoes changes in its meaning.¹⁰²

The two judges in the Court of Appeal who considered the application of the principle in *Salomon's* case did not address any of these issues. Unlike Staughton J, neither Kerr LJ nor Gibson LJ found it necessary to choose between the two versions of that principle which have been described. Even if it were assumed that its proper application is as a presumption of legislative intention, as the plaintiffs supposed,¹⁰³ their Lordships concluded that it was nevertheless possible to look at the treaties in question in order to assist in the interpretation of Article 5 of the 1972 Order. The judgment of Kerr LJ reveals the manner in which their Lordships reached this conclusion.¹⁰⁴

Kerr LJ noted 'a consistent parallelism between the treaties creating international organisations on the one hand and the consequential statutes and Orders in Council enacted in this country on the other'.¹⁰⁵ '[I]n virtually all cases including that of the ITC', constituent treaties concluded since the Second World War have imposed on the States party to them an obligation to constitute the organizations which they set up as legal persons within their national legal systems.¹⁰⁶ Parallel to this, a 'consistent practice' has emerged, marked by very few exceptions,¹⁰⁷ in the UK legislation relating to these organizations. To regulate their status under English law, orders in council have been issued under the enabling statutes which were currently in force incorporating the formula which those statutes have made available for that purpose¹⁰⁸—a formula which has appeared unchanged in each of those successive Acts¹⁰⁹ and which is employed by Article 5 of the 1972 Order. As Kerr LJ observed, these orders have been issued not only in full knowledge of the UK's treaty commitments, but also with the very purpose of

¹⁰² Cf. the comments of Lords Wilberforce (p. 278b-d; pp. 703h-704a), Diplock (pp. 279h-280b; p. 705b-d) and Fraser (pp. 287h-288h; p. 711a-h) in *Fothergill v. Monarch Airlines* (loc. cit. above (n. 101)).

The difficulties involved in determining the precise categories of treaties to which the principle applies, which were noted in n. 94, above, are also avoided if the second version of the principle is adopted; for a treaty is then relevant to the interpretation of a statute simply in so far as and as long as it is in force and binding upon the UK. Admittedly, understood in this fashion, the principle does not require a statute to be interpreted in the light of a treaty, even though that statute is enacted in order to enable the UK subsequently to become a party to that treaty, if that treaty has not yet become binding upon the UK at the date on which the statute falls to be construed. However, that does not mean that the treaty is then irrelevant to the construction of that statute, since it might be made pertinent by other principles of statutory interpretation, such as the principle which prescribes respect for a statute's purpose.

¹⁰³ Gibson LJ deliberately formulated the principle in this manner at pp. 1137h-1138a; p. 342c. See also Kerr LJ at pp. 1076h-1077a; p. 292g-h.

¹⁰⁴ References to the relevant passages of Gibson LJ's judgment will be made in the footnotes.

¹⁰⁵ p. 1080h; p. 295h.

¹⁰⁶ p. 1082c; p. 296j. See also p. 1060e-f; p. 278f; and text at n. 91, above.

¹⁰⁷ Three of these exceptional cases were discussed by Kerr and Gibson LJ: see text at n. 124, below. There are three further cases as well, of which Kerr LJ noted the existence, but which their Lordships did not discuss: pp. 1058h-1059a; p. 277d.

¹⁰⁸ pp. 1058g-1059c, 1060f and 1076h-1077a; pp. 277b-g, 278f and 292g; and see the quotation which Kerr LJ made from the judgment of Lord Bridge in the case of *Shearson Lehman Bros. Inc. v. Maclaine Watson & Co. Ltd. (International Tin Council intervening)* (No. 2), [1988] 1 WLR 16, [1988] 1 All ER 116 (to be noted in next year's volume of this *Year Book*), at p. 1077e-f; p. 293b. See also Gibson LJ at pp. 1137f-h and 1138b; p. 342b-c and f.

¹⁰⁹ For the relevant statutes, see text following n. 92 and nn. 71 and 120.

securing their implementation.¹¹⁰ Applying the principle in *Salomon's* case, he therefore thought it legitimate to presume that the orders in council 'must have been intended' to comply with the UK's obligations under the constituent treaties and so make the international organizations which they set up into legal persons at English law.¹¹¹ True, the formula which the orders have employed to accomplish this end was enacted and its meaning fixed before the treaties containing the relevant commitments had even been concluded.¹¹² Yet, as Kerr LJ remarked, '[i]f it had been thought that [that formula] would not be appropriate or sufficient [to fulfil the UK's treaty commitments], then some other formula would no doubt have been adopted.[¹¹³] But this was not done.'¹¹⁴ Those responsible for issuing the orders in council must, therefore, have supposed that the formula which they employed was capable of fulfilling the UK's treaty commitments. In itself, of course, this could hardly prove that the formula did indeed have that effect. As Kerr LJ observed, the meaning of the formula was fixed by the enabling statutes under which the orders in council were issued, so that, when those orders employed the formula which those statutes laid down, they could hardly have changed its meaning.¹¹⁵ Nevertheless, he considered that the conceptions which those issuing the orders had of the effect of the formula were relevant to the interpretation which should be given to it in the parent statutes, helping to show that the exercise of the power which those statutes conferred would result in the bestowal on an organization of full legal personality under English law.¹¹⁶

The final step in this argument requires some explanation. The probable reason why Kerr LJ considered the intentions of those responsible for issuing the orders in council to be of assistance in establishing the meaning of the formula laid down

¹¹⁰ Kerr LJ repeatedly stated that the orders have been 'consequential' on, or a 'response' to, the UK's treaty commitments: pp. 1058g, 1060f, 1076h, 1080g and h and 1081d; pp. 277b, 278f, 292g, 295g and h and 296b. The 1972 Order in particular makes this clear by expressly referring to the treaties which it is its aim to implement: pp. 1074a and 1076g; pp. 290c and 292e. See also Gibson LJ at p. 1137f; p. 342b.

¹¹¹ p. 1082c; p. 296j; and see pp. 1077a and 1081d and g; pp. 292h and 296b and e. See also Gibson LJ at p. 1136g and 1138c; pp. 341d and 342g.

¹¹² See text at n. 114, below.

¹¹³ Since the enabling statutes have made available for defining the status of an international organization under English law just the one formula, it follows that, if a different formula were to have been used, then it would have had to be embodied in a new statute.

¹¹⁴ p. 1082d; p. 296j.

¹¹⁵ p. 1082e-f; p. 297a. Kerr LJ's judgment often gives the impression that he assumed his sole task to be to ascertain the meaning which the formula was intended to have by those who drafted the orders in council employing it. However, it is clear from the passage here cited that Kerr LJ thought his major task to be to establish the meaning fixed for that formula by the enabling statutes under which the orders in council were made. See also p. 1080h, 1081f and 1082d; pp. 295h and 296d and j. See Gibson LJ at pp. 1133a and 1138b-c; pp. 338d and 342f.

¹¹⁶ If, whenever the power under Section 1(2)(a) of the International Organizations Act is exercised, the organization to which the order relates is vested with legal personality under English law, then an order in council employing the formula there laid down confers such a status even upon an organization which the UK is under no treaty obligation to make a person at English law. Gibson LJ thought that this did not prevent the formula being construed to have such an effect (p. 1138c; p. 342f-g), presumably because to confer personality under English law on such an organization would not put the UK in breach of any international legal duty (though cf. n. 333, below). It should be added that Section 1(6)(a) of the 1968 Act poses no problem in this respect. While this provision renders *ultra vires* the Act an order conferring on an international organization 'privileges and immunities' which are more extensive than those which the UK is bound by treaty to accord, it does not preclude the grant of 'legal capacities' which the UK is not obligated to bestow.

in the enabling statutes was that he thought those intentions helped reveal what the intentions were of those who had enacted those statutes.¹¹⁷ This kind of argument is familiar in international law. By examining the way in which the parties to a treaty apply it subsequently to its entry into force, it is sometimes possible to throw light on the meaning which that treaty bore back at the date of its adoption; for it can often be inferred that the parties applied the treaty in the way they did because that was the meaning which they had intended the treaty to have when they originally adopted it.¹¹⁸ To have force, this argument requires that the group whose practice is relied on to help construe the text is made up, at least in part, of those who participated in its adoption, though it need not include all of their number. This might be thought to bar its application in the instant case, since orders in council are issued by the Crown, while the enabling statutes relating to international organizations were enacted by Parliament. However, under the International Organizations Act 1968, orders in council may be issued by the Crown only if and when Parliament has approved them;¹¹⁹ and the situation was the same under the International Organizations (Privileges and Immunities) Act of 1950.¹²⁰ It was, therefore, possible to talk of orders in council issued under those Acts as revealing the intentions of Parliament,¹²¹ and the argument described could go through.¹²²

Kerr LJ relied on two other, subsidiary, arguments, both based on the UK's treaty commitments, to assist in the interpretation of Article 5; and, like his principal argument, they both used the principle in *Salomon's* case as a presumption of legislative intention. First, he pointed out that, in 1968, when Parliament enacted fresh enabling legislation relating to international organizations, it decided to retain the formula earlier used in the 1944 and 1950 statutes. By this time, it had already become 'standard practice' for the constituent treaties of international organizations

¹¹⁷ Kerr LJ thus relied on other arguments based on the intentions of Parliament in enacting the enabling statutes in order to substantiate his conclusion: see text at nn. 123-4, below. Gibson LJ made it clear that the intention of Parliament in enacting the 1968 statute was decisive to the proper interpretation of Article 5 and that the use made of the formula in the Act by subsequent orders in council helped throw light on what this intention was: pp. 1132h-1133a; p. 338d.

¹¹⁸ Or so it is said. See, e.g., Cot, *Revue générale de droit international public*, 70 (1966), p. 632 at pp. 639-47.

¹¹⁹ Section 10(1).

¹²⁰ Section 6(1). The procedure was somewhat different under the 1944 Act, the Crown being empowered by Section 2(1) to issue orders in council without obtaining the prior consent of Parliament. However, that subsection stipulated that, once made, orders had to be laid before Parliament and were liable to annulment if, within forty days of being so laid, either House prayed that this be done. (Although the Act speaks as if the Crown then had the power to choose whether to annul the order or not, constitutional conventions require the Crown to comply with such a prayer.) Orders issued under the 1944 Act could, therefore, be argued to reflect the intentions of Parliament, at least when no prayer was made that they be annulled. Section 2(1) of the 1944 Act was amended and the present procedure introduced by Section 2(1) of the Diplomatic Privileges (Extension) Act 1950. Later that year, the various statutes regulating international organizations were consolidated by the International Organizations (Privileges and Immunities) Act 1950.

¹²¹ Gibson LJ at pp. 1132h-1133a, 1136g and 1138b and c; pp. 338d, 341d and 342f and g.

¹²² This conclusion can also be supported by appealing to the intention of the Crown, rather than of Parliament; for the Crown, besides issuing the orders in council, also participates, alongside Parliament, in the process of legislation (cf. the dicta of Lord Denning MR, delivering the judgment of the Court of Appeal, in *R v. Secretary of State for Home Affairs and another, ex parte Bhajan Singh*, [1975] 2 All ER 1081 at p. 1083c), and, by means of the argument outlined in the text, it can be contended that its intention in making such orders reveals what was its intention when it collaborated in the enactment of the various enabling statutes.

to impose on the member States an obligation to constitute those organizations as discrete persons within their national legal systems. There having been no reason in 1968 to have expected this practice to change, it was reasonable to assume that Parliament retained the formula in Section 1(2)(a) since it thought it sufficient to enable the UK to discharge the obligations which were likely to be imposed on it by future constituent treaties.¹²³ Secondly, Kerr LJ pointed to three occasions on which primary legislation has been enacted in respect of a particular organization, rather than an order in council being issued under the current enabling statute. In each case, the constituent treaty of the organization concerned imposed an obligation on the UK to make it a person within the English legal system. Nevertheless, to regulate the status of these organizations in English law, the subsequent enactments simply used the formula found in the current enabling statute and now reproduced in Section 1(2)(a) of the 1968 Act. Surely, Kerr LJ held, with a free choice as to how to discharge the UK's treaty obligations, Parliament chose that formula because it thought that it did indeed discharge the UK's treaty obligations.¹²⁴

A final problem which was posed in relation to the operation of the principle in *Salomon's* case concerned the manner in which that principle permits an English court to refer to a treaty—indeed, the manner in which an English court may refer to a treaty whenever any principle, not just that in *Salomon's* case, makes its meaning pertinent to an issue of English law. Various of the parties to the present proceedings contended that, when referring to a treaty, a court might look at it in order to gather 'its general nature and effect', but cannot 'resolve any difficult question of construction' which might arise. An English court would thus be prevented from engaging in the full process of a treaty's interpretation according to the rules set out in the Vienna Convention on the Law of Treaties 1969, and, in particular, would be precluded from examining the background to a treaty in customary international law.¹²⁵ Instead, it would have to be content with the meaning which it might establish on 'an ordinary reading and understanding' of the treaty text. English courts, it was maintained, do not have sufficient ability or training to enable them to find, understand and assess the relevant international legal material and to apply the principles of interpretation proper to international legal texts. Staughton J rejected this contention, declaring: 'I cannot accept the notion that an English judge must indulge in a partial process of interpretation' of the kind suggested, 'however attractive such a labour-saving method might be'.¹²⁶ Kerr LJ did likewise in the Court of Appeal.¹²⁷

This conclusion is to be welcomed. The principle in *Salomon's* case would, after all, hardly serve its purpose if the courts were to run the risk of putting the UK in breach of its treaty obligations by not applying the methods and rules which are appropriate to the interpretation of treaties. Moreover, this conclusion evidences a refreshing confidence among the English judiciary in its ability to handle international law and international legal materials. In the instant case, this confidence

¹²³ p. 1082c-f; pp. 296j-297b. Gibson LJ did not make this argument, but his judgment might be thought to presuppose it: pp. 1137f-1138d; p. 342b-g.

¹²⁴ pp. 1058h-1059a, 1059c-e and 1060a-e; pp. 277d and f-g and 278b-e. See also Gibson LJ at p. 1138d-g; pp. 342h-343b.

¹²⁵ This argument had much greater practical significance in the context of the plaintiffs' second argument.

¹²⁶ p. 689d.

¹²⁷ p. 1076e-f; p. 292d.

was not simply verbal. It was also reflected in the thorough examination which both Staughton J and the Court of Appeal made of the provisions of the ITA and the controversial issues of international institutional law which were raised by the plaintiffs' second argument.¹²⁸ Such a readiness to resolve difficult international legal questions represents a highly desirable counterweight to the deliberate emphasis which Lord Wilberforce placed in his judgment in *Buttes v. Hammer*¹²⁹ on 'the nature and limits of the judicial function' and the inability of an English court to 'manage' difficult international legal 'standards' and to 'determine' or 'pass on' 'important . . . issues of international law'.¹³⁰

In conclusion, although they differed somewhat in the routes by which they arrived at this judgment, all five judges were firmly of the opinion that Article 5 of the 1972 Order in Council constitutes the ITC as a discrete legal person within the English legal system, separate and distinct from its member States.¹³¹ As such a person, the legal capacities which the ITC enjoys under Article 5 are those which are possessed by a 'body corporate' (understanding that phrase in its narrower sense of an incorporated company). However, the five judges were all agreed that Article 5 does not thereby make the ITC into a 'body corporate', nor is it to be deemed to be one.¹³² It, therefore, does not fall within the scope of those rules of English law which apply to the category of legal persons which is described and defined by that phrase.¹³³

It was in this last point that the explanation lay for the final problem which needed to be resolved in connection with the plaintiffs' first argument. If a formula was to be created whose use would bestow legal personality on an international organization, then why did Section 1(2)(a) of the 1968 Act employ a locution whose meaning was obscure and, to Kerr LJ, ambiguous? Why did not it follow the normal path for the creation of a legal person in English law and provide that international organizations might be constituted as 'bodies corporate'?¹³⁴ As Staughton and Millett JJ and Kerr LJ explained, the reason is clear.¹³⁵ If international organizations were to be constituted as 'bodies corporate', then they would be subjected to that body of rules of English law which relate to and regulate this category of legal entities, in particular, the rules relating to the administration and management of the internal affairs of companies laid down in the Companies Acts. The application of many of these rules to international organizations would be 'inconsistent with their international character' and with the choice of the member

¹²⁸ See text at nn. 155–255, below.

¹²⁹ *Buttes Gas and Oil Co. v. Hammer and another* (Nos. 2 and 3), [1982] AC 888, [1981] 3 All ER 616.

¹³⁰ pp. 936g–h and 938a–b; pp. 632e–f and 633d–e. This is not to suggest that Lord Wilberforce's decision in that case was ill-founded, but, rather, that the reasons which he gave to support his conclusion might be understood to counsel judicial abstention from resolving questions of international law where such reticence is not merited.

¹³¹ Both Staughton J (p. 703c) and Kerr LJ (p. 1081d; p. 296b) suggested the alternative conclusion that the ITC is to be treated 'as if' it is a legal person at English law—in other words, the ITC is a fictitious legal fiction!

¹³² See Staughton J at p. 695h; and Millett J at p. 713g. See also the passages from Millett J's judgments in *In re International Tin Council* and *Maclaine Watson & Co. Ltd. v. International Tin Council* (No. 2) quoted in last year's volume of this *Year Book* at p. 409 n. 35 and p. 425 n. 109.

¹³³ See, however, text at nn. 368–82, below.

¹³⁴ In *Bonsor v. Musicians' Union* (loc. cit. above (n. 34)), an argument of this type moved Lord MacDermott to conclude that the Trade Union Act 1871 did not enable trade unions to be constituted as discrete legal persons: p. 144; p. 535f–g.

¹³⁵ Staughton J at p. 695c; Millett J at p. 713f; and Kerr LJ at p. 1081e–f; p. 296c–d.

States to submit these matters to the regulation of international law and international law alone—a choice which English law should respect.¹³⁶ The failure of Section 1(2)(a) to provide that international organizations should become, or be deemed to be, 'bodies corporate' was, therefore, not surprising. At the same time, that provision is framed in the familiar terminology of 'bodies corporate' and 'legal capacities', eschewing other conceivable formulae, such as 'legal personality' or 'legal entity', with which English lawyers are not conversant.¹³⁷

2. *The ITC as a legal person with a 'mixed' nature*

Even if the ITC is, therefore, a discrete legal person in English law, so that transactions concluded in its name establish rights and obligations for an entity separate and distinct from the member States, nevertheless, the plaintiffs contended, the nature of the existence which the ITC enjoys within the English legal system is such that, whenever an act is performed in the name of that organization, it commits not merely the ITC itself, but also and at the same time its member States. Consequently, the contracts and loan agreements which the plaintiffs had concluded with the ITC established in their favour rights both against the ITC and against its member States, and the plaintiffs were thus able to sue the member States directly for the money owing to them under those agreements.

Were the ITC to possess such a nature, further questions would then arise concerning the character of the liability borne by its member States. Would they be liable jointly or jointly and severally? Would their liability be concurrent with that of the ITC, so that the organization's creditors could choose from which source to recover their debts, or would it be secondary in nature, creditors only being entitled to proceed against the member States once the ITC itself had failed to discharge its obligation to pay the sums due? If the latter, then what conditions would need to be fulfilled for the default of the ITC to be established and the liability of the member States triggered? Various answers to these questions were suggested by the plaintiffs. However, the problems which they posed took second place to the central issue of the nature of the legal entity which is the ITC in English law.

The first of the two grounds on which the plaintiffs based their contention had its foundations in propositions of English law. As has already been seen, under English law, if a number of people come together to trade in a common name, it is possible that their association remains unincorporated, in which case no discrete legal person is formed which is separate from the members of the group and acts performed in the name of the association are in law but the acts of its members. On the other hand, the association may take the form of an incorporated company—that is, a 'body corporate' or 'corporation', in the narrower sense of those terms.¹³⁸ A new legal person is then formed, distinct from the members of the association; and, while transactions concluded in the name of the association commit the new legal person representing the association, they do not, automatically and without more, commit the association's members. The plaintiffs, however, contended that the latter phenomenon is not a consequence of the former—that is, the fact that the members of an incorporated company are not necessarily liable to the company's

¹³⁶ See the judgments of Millett J in *In re International Tin Council and Maclaine Watson & Co. Ltd. v. International Tin Council*, noted in last year's volume of this *Year Book* at pp. 411–13 nn. 44–56 and p. 423 nn. 95–101.

¹³⁷ Kerr LJ at p. 1081f; p. 296d–e.

¹³⁸ See text at n. 29, above.

creditors for its debts and liabilities is not a consequence of the fact that the company enjoys independent legal personality. Rather, it derives from the particular process by which incorporated companies are constituted as legal persons: namely, by registration under the Companies Act or by the grant of a Royal Charter. Consequently, if an association is constituted as a legal person by some other means than these, it does not follow from the existence of its legal personality that its members are not automatically committed by, and liable for, its acts. On the contrary, alongside its personality, such an association retains one of the essential features of an unincorporated association: that acts done in its name commit its members. Loosely speaking, such an association might, therefore, be described as 'mixed' in nature, combining the legal personality of a 'body corporate' with the liability of an unincorporated association.¹³⁹

The ITC has not been constituted a 'body corporate' (in the narrow sense of that phrase) by registration under the Companies Acts or by the grant of a Royal Charter. Moreover, Article 5 of the 1972 Order does not provide that the ITC is a 'body corporate', nor does it enjoin that it should be deemed to be one.¹⁴⁰ It follows, the plaintiffs maintained, that the ITC, while it enjoys legal personality, does not possess that opacity of nature which characterizes a 'body corporate' under English law and which shields its members from liability to its creditors. The ITC is, instead, translucent, its deeds being the members' deeds and its liabilities theirs; and, that being so, the member States should be held directly liable to the ITC's creditors for the organization's debts.

Of the judges who considered this argument, all four rejected it. As has already been seen,¹⁴¹ Millett J thought the effect of the 1972 Order to be that, in respect of its legal capacities, the ITC partakes of the nature of a body corporate: just as, in the case of a body corporate, the legal capacities ascribed to an association are vested in an independent legal person, distinct from the members of that association, so it is with the ITC. By the same reasoning, Millett J held that, just as the legal capacities vested in a body corporate are enjoyed by a legal person which alone is liable for the obligations incurred through their exercise, so the ITC 'has the characteristic attribute of a body corporate which excludes the liability of the members, that is to say the ability to incur liabilities on its own account which are not the liabilities of the members'.¹⁴² Staughton J followed a similar line of reasoning. Having held the effect of Article 5 to be that 'in its dealings with others . . . [the ITC] is to be treated as if it is a body corporate',¹⁴³ he assumed it to follow that, as with a body corporate, the members of the ITC are not liable without more to the organization's co-contractors.¹⁴⁴ Both Staughton J and Millett J were thus able to

¹³⁹ Though, as in the case of a 'body corporate', the legal person representing the association is liable too.

¹⁴⁰ See text at n. 132, above.

¹⁴¹ See text at nn. 43-5, above.

¹⁴² p. 713e.

¹⁴³ p. 695h-i, and see text at n. 48, above.

¹⁴⁴ p. 696a. Staughton J corroborated his interpretation of Article 5 by referring to Article 6 of the 1972 Order. If, as the plaintiffs contended, the States members of the ITC were liable, together with the organization, for debts contracted in its name, then some provision should have been made in the Order to regulate the immunities which they were to enjoy in respect of actions which might be brought against them by the organization's creditors, since, otherwise, they would have been entirely shielded from any such suit by the absolute immunity which States possessed under English law in 1972 when the Order was issued. Yet Article 6 deals solely with the immunities which are to be enjoyed by 'the

reject the plaintiffs' argument without passing comment on the contentions which they made regarding the nature and effect of legal personality in English law.

Kerr and Gibson LJJ took a more robust approach, rejecting the plaintiffs' argument by refuting its jurisprudential premiss; and, in this, they were joined by Staughton J, who thus provided an alternative ground for his decision. Kerr LJ held that '[t]he interposition of a legal entity between an unincorporated group of persons on the one hand and third parties who enter into contracts with the legal entity on the other, has the consequence under the common law that the members of the group have no liability for the contracts made by the entity, unless these were made on their behalf pursuant to the doctrine of agency'.¹⁴⁵ Staughton J put it more succinctly: 'separate legal personality is, in English law, inconsistent with the members of an association being liable for its debts'.¹⁴⁶ True, neither the International Organizations Act 1968 nor its predecessors contain any provision which expressly governs the liability of the States members of an international organization. As Gibson LJ remarked, 'the legislation was not apparently directed to the avoiding or to the preservation or to the imposition of liability on the part of [those States]',¹⁴⁷ the probable reason being that 'it was not envisaged that any organisation would be left . . . to default on its obligations to [its] creditors'.¹⁴⁸ However, in so far as the statutes relating to international organizations have empowered their constitution as persons of English law, it necessarily follows that the States members of an organization in respect of which this power is exercised are not liable to the organization's creditors for its debts. This might be 'a consequence which Parliament had no specific purpose to achieve';¹⁴⁹ but it ensues, Gibson LJ held, both from the 'basic rule' of English law relating to the effects of legal personality¹⁵⁰ and from the failure of Parliament to derogate from that rule in the relevant statutes.¹⁵¹

Therefore, in so far as the plaintiffs based their contention that the ITC is a 'mixed' entity on arguments 'derived solely from the 1972 order and the general principles of [English] law',¹⁵² they were doomed to failure. 'Although one may have sympathy with the plaintiffs and regret the comparative rigidity of our jurisprudence which leads to this consequence, I can see no escape from this con-

Council', and 'no provision is made as to the immunity of the members', indicating that they are indeed not liable for the ITC's debts: p. 695e-f. Staughton J found only 'slight help' in this argument, however (p. 695d, and n. 71, above), and no reference to it appears in the judgments of the Court of Appeal.

¹⁴⁵ p. 1087f-g; p. 301b. As to whether the ITC contracts as the agent of its member States, see section 3 below.

¹⁴⁶ p. 692a. Both Staughton J (p. 690h-i) and Kerr LJ (p. 1085h; p. 299h) noted that, for a brief period in English law, during the currency of the Joint Stock Companies Act 1844, it was possible to bestow legal personality on an association without thereby excluding the liability of its members for debts contracted in its name. However, the relevant provisions of that Act were soon repealed by the Limited Liability Act of 1855, which took a view of the effect of legal personality concordant with that traditionally espoused by the common law. Both judges considered the 1844 Act to represent a 'historical staging post' in the evolution of the law relating to business organizations from the common-law position that, failing royal intervention, such enterprises were simply unincorporated associations, to the modern, statute-based idea that individuals might create an incorporeal legal person to whose creditors they are not liable.

¹⁴⁷ p. 1143g; p. 347b. See also p. 1133b-d; p. 338d-f.

¹⁴⁸ p. 1133c-d; p. 338f.

¹⁴⁹ p. 1133d-e; p. 338g.

¹⁵⁰ p. 1143e; p. 346j.

¹⁵¹ pp. 1133f and 1143f-g; pp. 338h and 347b.

¹⁵² Gibson LJ at p. 1143e-f; pp. 346j-347a.

clusion', held Kerr LJ,¹⁵³ adding that, even if justice balked at such a result and called for a different solution, 'we cannot make forensic bricks without jurisprudential straw'.¹⁵⁴ Consequently, to sustain their contention, the plaintiffs had to look for support elsewhere than to the doctrines of English law; and, to this end, it was to international law that they appealed.

The plaintiffs claimed it to be a rule of general customary international law that, if an international organization enjoys legal personality, then the nature of its juridical existence is 'mixed', so that, alongside the organization itself, the member States are directly liable to those to whom the organization is obligated. The principles of international law which govern the interpretation of treaties require that the ITA be read in the light of this rule;¹⁵⁵ and, since the ITA neither expressly derogates from it nor contains anything which is inconsistent with its operation, that treaty should be understood to incorporate this rule or should at least be read subject to it.

These arguments of international law received little attention at first instance. Millett J did not consider them at all, apparently believing it impossible to argue that the ITC bears a 'mixed' nature once Article 5 of the 1972 Order is read in the light of the general principles of English law; and Staughton J, while indicating that he thought there to be evidence to support the plaintiffs' contentions, disposed of the case without arriving at any conclusions on the matter.¹⁵⁶ In the Court of Appeal, however, the plaintiffs' arguments received considerable attention.

All three of their Lordships were at one in believing it necessary to distinguish two questions which might arise as to the liabilities of the States members of an international organization.¹⁵⁷ First, where an international organization enjoys international legal personality, the question poses itself whether the States members of that organization are liable in international law for its international legal obligations. The second question arises where an international organization is endowed with juridical personality within some system of municipal law and concerns the liabilities which the member States of such an organization bear under that system of law for the obligations incurred by the organization under that same law. These two questions being distinct, international law might simultaneously answer them in different ways.¹⁵⁸ Thus, the difficulties which are likely to beset a State which wants to enforce its rights against an international organization might conceivably prompt States to recognize that the members of such a body should be directly liable under international law to the subjects to which it owes its international legal obligations; whereas the necessity of ensuring the orderly administration of the budgets of international organizations might lead States to recognize that, when an organization acquires personality within some system of municipal

¹⁵³ p. 1088b; p. 301f.

¹⁵⁴ p. 1088c-d; p. 301g. See also Gibson LJ at p. 1143e-f; pp. 347j-348a.

¹⁵⁵ The relevant principle is now codified in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, 1969.

¹⁵⁶ p. 687a and d. See text at nn. 323-5, below.

¹⁵⁷ Kerr LJ at p. 1095a-e; p. 307a-d; Nourse LJ at p. 1120e; p. 328b; and Gibson LJ at p. 1154h; p. 356c.

¹⁵⁸ There is no doubting that the second question admits of regulation by international law just as much as the first. International law can prescribe that an organization should be endowed with legal personality under some system of municipal law; and, that being so, there is no reason why it should not also seek to regulate the nature of the existence which that organization consequently enjoys within that legal system.

law, the organization and the organization alone should be liable under that law for the performance of its obligations. Consequently, evidence as to the rule of international law which has developed in response to one of these questions is not directly pertinent to proving the rule which has evolved in response to the other. Kerr LJ accordingly observed that:

on the available material the better view may well be that the characteristics of an international organisation are those of a 'mixed' entity rather than of a body corporate unless, of course, there is an express disclaimer of liability as in the 16 'limited liability' treaties of which the Natural Rubber Agreement 1987 is now a pre-eminent example. But even if this be so, it does not follow that the parties to other treaties creating international organisations, such as [the ITA], can thereby be taken to have accepted any obligations within the framework of municipal laws and the jurisdiction of national courts. . . . Thus it may well be that if an international association were to default on an obligation to a state or association of states or to another international organisation, then the regime of secondary liability on the part of its members would apply as a matter of international law. But it does not by any means follow that any similar acceptance of obligations by the members can be assumed within the framework of municipal systems of law.¹⁵⁹

Therefore, in the present proceedings, it was not necessary to study the rule of international law which governs the liability under international law of the member States of international organizations; for, whatever that rule might be, the regime which it prescribes 'cannot simply be transposed' to determine the content of the rule of international law which regulates their liability in municipal law.¹⁶⁰ Material put before the Court of Appeal relating to the former rule was thus dismissed as not being 'in point',¹⁶¹ or as providing 'no indication, one way or the other' as to the content of the latter rule;¹⁶² and it is scarcely surprising that no references appear in any of their Lordships' judgments to Articles 36 and 74 (3) of the Vienna Convention on the Law of Treaties 1986, to the drafting history of those articles,¹⁶³ to the work of the Institut de Droit International on the law governing treaties concluded by international organizations,¹⁶⁴ or to the theory and practice of the so-called 'mixed agreements' of the European Communities.¹⁶⁵

To prove that a rule of customary international law exists that the States members of an international organization which enjoys juridical personality under some system of municipal law are liable under that law to those to whom the organization owes obligations under that same law, the plaintiffs relied on four main bodies of evidence. First, they pointed to the fact that the legal systems of many States recognize the existence of legal persons with a 'mixed' nature, citing, amongst others,¹⁶⁶ the *société en nom collectif* of French law, the *Kommanditgesellschaft auf*

¹⁵⁹ p. 1095a-d; p. 307a-c. For the sixteen 'limited liability' treaties mentioned by Kerr LJ, see text at nn. 173-84, 319-22 and 326-9, below.

¹⁶⁰ p. 1095e; p. 307d.

¹⁶¹ Nourse LJ at p. 1120e; p. 328b.

¹⁶² Gibson LJ at p. 1154h; p. 356c.

¹⁶³ And especially to Article 36 *bis* of the International Law Commission's Draft Articles: *Yearbook of the International Law Commission*, 1982, vol. 2, part 2, p. 9 at pp. 43-7.

¹⁶⁴ See especially Dupuy's reports to the Institut: *Annuaire de l'Institut de Droit International*, 53 (1972), at pp. 256-9, 271-7, 316, 376-9 and 382.

¹⁶⁵ See, e.g., Schermers and O'Keefe (eds.), *Mixed Agreements* (1983).

¹⁶⁶ In addition to the following cases, the plaintiffs also referred to the Jordanian Companies Law of 1964: see Kerr LJ at p. 1085g; p. 299g. The arbitral tribunal in the *Westland* case, on whose award the plaintiffs relied, also referred to the *société coopérative* and the *société en commandite par actions* of Swiss law: see the passage of its award quoted by Nourse LJ at p. 1022a-c; p. 329d-f.

Aktien of West German law, and the *sociedad en comandita* of Hispanic legal systems. Within the UK itself, there is the partnership of Scottish law;¹⁶⁷ and, under English law, not only were 'mixed' entities known during a brief period in the nineteenth century,¹⁶⁸ but their reintroduction is also promised by EC Council Regulation 2137/85 relating to the proposed European Economic Interest Grouping. Secondly, the plaintiffs relied on the writings of several international lawyers. They were able to find few jurists who have discussed in any detail the liability under municipal law of the States members of international organizations,¹⁶⁹ but the plaintiffs claimed their opinions to support the existence of a rule of customary law of the kind alleged. Thirdly, the plaintiffs relied on the arbitral award given in 1984 in the case of *Westland Helicopters Ltd. v. Arab Organization for Industrialization*.¹⁷⁰ Fourthly, they pointed to the practice of States in drafting the constituent instruments of international organizations. They cited sixteen such treaties¹⁷¹ in which a provision has been inserted which, it was claimed, expressly excludes the liability of the member States for the obligations assumed by the organization; and the familiar argument was then made that the fact that the drafters of those treaties thought it necessary to insert such clauses indicates their belief that, if no such clauses had been inserted, the member States of the relevant organizations would have been liable for their debts.

All three of the judges on the Court of Appeal agreed that this evidence failed to prove the existence of the rule of customary international law alleged by the plaintiffs.

Although their Lordships differed somewhat in their reading of the doctrine, they were all agreed that it did not support the existence of a rule of international law imposing on the member States of an organization liability to its creditors.¹⁷² As for the construction which should be put on the practice of States in inserting into the constituent treaties of certain international organizations clauses limiting or excluding the liability of the members for the obligations of those organizations, both Kerr¹⁷³ and Nourse¹⁷⁴ LJ concurred with the analysis of Gibson LJ:

¹⁶⁷ Under the law of Scotland, unlike English law (as to which see n. 35, above), a partnership has legal personality; but, at the same time, and like an English law partnership, its members are directly liable to its creditors for debts assumed in its name: Section 4 (2) of the Partnership Act 1890.

¹⁶⁸ See n. 146, above.

¹⁶⁹ Adam, *Les Organismes internationaux spécialisés*, vol. 1 (1965); Shihata, *Revue égyptienne de droit international*, 25 (1969), p. 119; Schermers, *International Institutional Law* (1980); and Seidl-Hohenveldern, *Corporations in and under International Law* (1987). Extensive quotation from these writings was made by Nourse LJ at pp. 1118g–1121a; pp. 326h–328f.

¹⁷⁰ Unreported. Quotations from this award appear in the judgment of Nourse LJ at pp. 1121g–1122e and 1122g–h; pp. 329b–g and 329j–330a.

¹⁷¹ They are listed in the 'Annexe' which is appended to the judgment of Kerr LJ, being marked by an asterisk: pp. 1112d–1114d; pp. 321a–323b. See also Gibson LJ at pp. 1152f–1153b; p. 354d–h.

¹⁷² Gibson LJ thought there to be 'no general agreement' among the writers that international law imposes such liability (p. 1149a; p. 351f), while Nourse LJ thought the doctrine to support a view of the law inconsistent with the existence of any general rules of customary law on the issue at hand (p. 1119a; p. 327a). Kerr LJ, on the other hand, considered 'the preponderant view' of the writers to be in favour of the rule alleged by the plaintiffs; but he held that this did little to prove that rule's existence, since not only are the writers few in number, but also the 'uncertainty' with which their views are expressed reflects the sparsity and ambiguity of the evidence in their support: p. 1094d; p. 306e.

¹⁷³ p. 1094e–f; p. 306f–g.

¹⁷⁴ p. 1123e–g; p. 330f–g.

The inclusion of these clauses in constituent treaties of a number of international organisations which, from their nature and purposes, were likely to engage in financial transactions with other states or international organisations and with private institutions at the level of municipal law, is impressive. Such terms are consistent with the acceptance by the states concerned that liability of members would arise if no such terms were included; but they are also, as I think, consistent with a state of uncertainty as to the rules of public international law and with a desire to declare what the states regarded as the consequences in international law of the existence of separate legal personality and of stated limits on members' contributions to the organisation. There was, no doubt, further an intention to warn those dealing with the organisation. I am unable to accept that the practice shown in these treaties can fairly be regarded as recognition by the states concerned of a rule of international law that absence of a non-liability clause results in direct liability, whether primary or secondary, to the creditors of the organisation.¹⁷⁵

To regard it as such, evidence would need to be adduced, over and above the practice of inserting these clauses, that States recognize such liability to exist when no clause of this kind is incorporated in the constituent treaty of an international organization;¹⁷⁶ but, as Gibson LJ observed:

[n]othing is shown of any practice of states as to the acknowledgement or acceptance of direct liability by any states by reason of the absence of an exclusion clause.¹⁷⁷

While Kerr LJ concurred with Gibson LJ's analysis, he also rejected the plaintiffs' argument for the further, more fundamental reason that he believed these treaty provisions not to deal with liability under municipal law at all. Rather, he thought them to govern the liability of States in international law for the international legal obligations of the organizations of which they are members; and, as such, he held that they were quite irrelevant to the task of finding the rule of international law regulating member States' liability under municipal law for the municipal law undertakings of those same organizations.¹⁷⁸ Although he at one point hinted that he shared this opinion,¹⁷⁹ Gibson LJ elsewhere assumed these treaty provisions to deal with both forms of liability, international and municipal.¹⁸⁰ Thus he cited as an instance of them the clause contained in the constituent treaty of the Caribbean Food Corporation which excludes the liability of the membership for the obligations of that organization.¹⁸¹ It is patent that this clause deals with liability under municipal law, for it expressly requires the members of that organization to make the regime which it lays down prevail within their national legal systems.¹⁸² Moreover, Kerr LJ himself considered it to be of 'some significance' that the International Rubber Agreement, which was concluded at the very end of 1987, after the collapse of the ITC and the launch of the present actions, includes a clause limiting the liabilities of the member States.¹⁸³ He thus intimated

¹⁷⁵ p. 1153b-d; pp. 354h-355a.

¹⁷⁶ Kerr LJ thus remarked that treaties containing these clauses 'cannot in themselves provide sufficient evidence of the practice of states' to prove the rule alleged by the plaintiffs: p. 1094f; p. 306g.

¹⁷⁷ p. 1153e; p. 355a.

¹⁷⁸ pp. 1095a-d and 1095h-1096a; p. 307a-c and g-h. See text at nn. 157-65, above.

¹⁷⁹ p. 1154h; p. 356c.

¹⁸⁰ See, e.g., the passage quoted at n. 175, above.

¹⁸¹ p. 1154f-g; p. 356a. The UK is not a member of this organization and no order in council has been issued or statute enacted in relation to it.

¹⁸² Although Gibson LJ thought this provision somewhat unusual, that was because it explicitly imposes an obligation on member States with regard to the content of their national laws. See text at nn. 317 and 328-9, below.

¹⁸³ p. 1094g-h; p. 306g-j.

that the context in which that clause was drafted justifies reading it to deal with liability under municipal, as well as international, law. Yet, in spite of this, he proceeded to treat that clause as dealing solely with liability at the level of international law.¹⁸⁴

The Court of Appeal was also agreed that the award in the *Westland Helicopters* arbitration did not prove the general rule alleged by the plaintiffs, even though it fixed the member States of the Arab Organization for Industrialization with liability for the agreements of that body. Their Lordships differed radically in the reasons which led them to this conclusion, though. Kerr LJ thought the award not in point, holding that it dealt with the rules of international law relating to the liability of member States under international, rather than municipal, law.¹⁸⁵ Nourse and Gibson LJ, on the other hand, considered the award to relate directly to the task in hand; yet they disagreed as to its correct interpretation. Nourse LJ held the award to support a formulation of the applicable international law quite different from that argued for by the plaintiffs.¹⁸⁶ Gibson LJ, however, read the award to support the plaintiffs' contentions, the arbitrators, in his opinion, having upheld a general rule of international law in favour of the liability of member States under municipal law to an organization's creditors.¹⁸⁷ Nevertheless, in so far as it held this, he regarded the award as 'contrary to principle',¹⁸⁸ which, he believed, supported a view of the relevant international law diametrically opposed to that espoused by the plaintiffs.¹⁸⁹

All three of their Lordships were, therefore, agreed that there was 'nowhere near' sufficient evidence to establish the general rule argued for by the plaintiffs.¹⁹⁰ As Kerr LJ concluded, particularizing his remarks to the ITC:

In sum, I cannot find any basis for concluding that it has been shown that there is any rule of international law, binding on the member states of the ITC, whereby they can be held liable . . . in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name.¹⁹¹

However, beyond this point, there was disagreement within the Court of Appeal.

Having rejected the argument advanced by the plaintiffs, Gibson LJ went on to hold that international law in fact provides that States members of an international organization which enjoys personality within a national legal system are not directly liable under that system of municipal law to those to whom the organization owes obligations under that same law, 'unless on a proper construction of the constituent document [of that organization], by reference to terms express or implied, . . . direct . . . liability had been assumed by the members'.¹⁹² To justify

¹⁸⁴ See the passage quoted at n. 159, above; and p. 1096a-b; p. 307h. For further questions which arose concerning the treaty practice cited by the plaintiffs, see text at nn. 319-22 and 326-9, below.

¹⁸⁵ p. 1095d-e; p. 309d. Kerr LJ added that, even if it might be used to help establish the rule of international law on the latter subject, it was difficult to regard the award as 'a satisfactory precedent for any purposes, at any rate at present', in view of the fact that it was currently under review by the Swiss courts; p. 1095e; p. 307d.

¹⁸⁶ p. 1123c-d; p. 330d-e. For Nourse LJ's opinion on the position at international law, see text at nn. 199-207, below.

¹⁸⁷ pp. 1151b-c and 1153e; pp. 353c and 355b.

¹⁸⁸ p. 1151c; p. 353c.

¹⁸⁹ See text at nn. 192-5, below.

¹⁹⁰ Kerr LJ at p. 1095d; p. 307c; and see Gibson LJ at p. 1148h; p. 351d.

¹⁹¹ p. 1095f; p. 307e.

¹⁹² p. 1151d; p. 353d; and see p. 1151e; p. 353e.

this proposition, Gibson LJ did not claim that the practice of States indicates their recognition of such a rule. Rather, echoing the terms of Article 38 (1) (c) of the Statute of the International Court of Justice, he claimed it to follow from 'basic principles of law as generally received in the legal systems of states':¹⁹³

international law recognises the power of states to create an international organisation with legal personality separate from its members. If that is done, principle should require that, so far as concerns those states who must recognise the validity of the legal personality so created, including those who are party to the constituent agreement, liability on the contracts of the organisation should be limited, in the absence of agency, to the parties to the contract unless some positive rule or provision should impose liability. A provision to that effect might be found in the terms, express or implied, of the constituent document of the organisation. Such liability, therefore, is not, in my judgment, to be founded simply on the absence of a provision excluding it.¹⁹⁴

There being no evidence that a 'positive rule' of law has developed imposing such liability, Gibson LJ concluded that this residual principle remains valid and effective.¹⁹⁵

While Kerr LJ shared Gibson LJ's conviction that there is no general rule of customary international law which imposes on the member States of an international organization liability to its creditors for its debts, he did not go along with him in holding that, rather than imposing such liability, international law in fact prescribes that it should not exist. He adduced no evidence to show that States have recognized such a rule; nor, moreover, did he concur with Gibson LJ's proposition that, in the absence of any evidence as to the rule which States have recognized, a solution can be found in the existence of a general principle precluding the liability of States. Indeed, prior to examining the evidence regarding the position at customary international law, Kerr LJ expressly rejected the notion that he should apply as a residual presumption the common law principle that the possession by an association of juridical personality shields its members from liability to its creditors for its acts. Examining the foreign legal systems to which the plaintiffs referred, he found that 'mixed entities are prevalent in civil law systems';¹⁹⁶ and, since States, when formulating rules of international law, generally bring to bear concepts familiar from their own municipal laws,¹⁹⁷ Kerr LJ thought it to follow that, in so far as States have recognized a rule of international law governing the liability in municipal law of the States members of international organizations, there is no reason to assume that they have all assumed it to follow from the organization's possession of municipal legal personality that the liability of its member States is thereby excluded. Indeed, in view of 'the prevalence of civil law over common law systems throughout the world generally', he thought that the majority of States might well have taken the opposite point of view.¹⁹⁸ True, Kerr LJ directed his remarks to the question whether any assumptions could be made about the likely *opinioes juris* of States, and not to whether a principle might be found, common to the majority of national legal systems, which might apply at international law, failing the existence of a customary rule on the matter in hand. However, his

¹⁹³ p. 1149c; p. 351g.

¹⁹⁴ p. 1149c-e; p. 351g-j.

¹⁹⁵ p. 1151e; p. 353e.

¹⁹⁶ p. 1085c; p. 299c.

¹⁹⁷ Especially, when, as here, the rules of international law are to regulate matters of municipal law.

¹⁹⁸ p. 1085b; p. 299b.

findings are equally pertinent to the latter problem, revealing that it is impossible to claim that there is any generally shared principle, either in favour of or opposed to the liability of the members of an association with legal personality. Therefore, having, on the one hand, rejected the existence of a rule of customary law of the kind alleged by the plaintiffs, while having, on the other hand, failed to espouse the rule of international law found by Gibson LJ, Kerr LJ appears to have been of the opinion that general international law neither imposes municipal law liability on the member States of an international organization nor shields them from it.

In respect of the position at general international law, Kerr LJ was thus broadly in agreement with Nourse LJ. Both failed to follow Gibson LJ in postulating a general principle antithetical to the liability of member States. Nourse LJ, however, was more explicit in rejecting the existence of any general rules of international law on the matter in hand, proclaiming that 'there is no established rule either way'.¹⁹⁹ In reaching this conclusion, he derived assistance from the writings of jurists²⁰⁰ and a survey of national laws,²⁰¹ both of which he thought to evidence 'the principle'²⁰² that 'the attribution of legal personality to an international organisation does not necessarily free its members from liability for its obligations'.²⁰³ However, it was on the 'valuable'²⁰⁴ award in the *Westland Helicopters* case that Nourse LJ relied most heavily,²⁰⁵ noting that, in order to determine the liability of the member States on the contracts of the Arab Organization for Industrialization, 'the tribunal's approach was . . . not to lay down any general rules', but, rather, 'to base themselves primarily on the constitution' of that organization.²⁰⁶ There thus being no applicable general rules of international law, it followed that, to ascertain whether the member States of an organization are liable in municipal law for its debts, the answer must be sought in the interpretation of the constituent treaty of that particular organization:

it is inherent in the views of the jurists and the *Westland* tribunal that the founding states of an international organisation can, by the terms of its constitution, provide for the exclusion or limitation, alternatively no doubt for the inclusion, of their liability for its obligations; and, moreover, that such provision will be determinative of that question for the purposes of international law. Thus the intention of the founding states is paramount and . . . all relevant provisions and circumstances must be studied in order to ascertain what it is.²⁰⁷

The Court of Appeal was thus in disagreement as to the position at general international law, Gibson LJ, on the one hand, claiming there to be a principle excluding the liability of member States, and Nourse and Kerr LJ, on the other hand, proclaiming, more or less explicitly, the absence of any general rules on the

¹⁹⁹ p. 1115g; p. 324d.

²⁰⁰ Loc. cit. above (n. 172).

²⁰¹ p. 1126c-d; p. 332j. See also the passage from the *Westland Helicopters* award which is quoted at pp. 1121g-1122e; p. 329b-h.

²⁰² p. 1124g; p. 331f.

²⁰³ p. 1119a; p. 327a.

²⁰⁴ p. 1123c; p. 330d.

²⁰⁵ Nourse LJ repeatedly appealed to the award in support of his interpretation of international law: pp. 1123h, 1126b, e and h; pp. 330h, 332h and 333a and d.

²⁰⁶ p. 1123c-d; p. 330d-e.

²⁰⁷ p. 1123h; p. 330h-j. Nourse LJ rejected Schermers's contention that 'it is impossible for the members of an international organisation to exclude or limit their liability for its obligations', remarking that 'every consideration of corporate law and policy seems to be against it': p. 1126h; p. 333d.

subject. Nevertheless, all three judges were of the opinion that, whatever the general position at international law, the States constituting an international organization are free to decide for themselves what regime is to govern the liability of its member States for its acts.²⁰⁸ In order to determine whether international law imposes on the member States of the ITC liability in English law to the organization's creditors, it was consequently necessary to look to the ITA.

Their Lordships were in disagreement, however, as to the correct interpretation of that treaty. Kerr LJ held:

I cannot find anything in [the ITA] to support the suggestion that the parties to this treaty intended that they should be liable for the contractual obligations of the ITC if these should remain unperformed. On the contrary, such indications as there are point firmly in the opposite direction.²⁰⁹

Gibson LJ concurred with the first of these two propositions, noting the absence from the ITA of any provision expressly imposing liability to the ITC's creditors on the member States,²¹⁰ and clearly assuming that no implication in favour of their liability could be drawn from any of its terms.²¹¹ However, as regards Kerr LJ's second proposition, Gibson LJ did not find it necessary to determine whether the ITA implicitly excludes the liability of the members of the ITC; for, in the absence of any clause imposing liability, he considered general principle to shield them from the organization's creditors regardless.²¹² However, in stark contrast with Kerr and Gibson LJ, Nourse LJ could find no implication in the ITA that the member States are without liability to the ITC's creditors. Rather, he held:

judged objectively, the intention of the states who were parties to the [ITA] was that the members of the ITC should be liable for its obligations.²¹³

Kerr LJ pointed to two features of the ITA in particular as indicating that the non-liability of the member States is presupposed. First, he noted that, '[a]part from articles 60.2 (b) and 21 read with the definition in article 2, there is no provision for the liability of members to pay anything beyond their allocated contributions to the administrative and buffer stock accounts'.²¹⁴ As an indication that the

²⁰⁸ See the passages from the judgments of Gibson and Nourse LJ which are quoted above at nn. 194 and 207. Similarly, to determine the position at international law as to the liability of the member States of the ITC, Kerr LJ began with a study of the ITA (p. 1091b; p. 303j), and then went on to examine the position at general international law to see what light, if any, it might throw on the conclusions which he had drawn from that treaty: p. 1092c; p. 304h.

²⁰⁹ p. 1091c; pp. 303j-304a. See also p. 1092b; p. 304g.

²¹⁰ p. 1148e; p. 351b.

²¹¹ Gibson LJ held that the general principle of international law which he thought to shield members of an organization from liability for its debts was susceptible to derogation by means of an 'implied term': see the passage from his judgment quoted at n. 194, above, and the other passage referred to in that note. Nevertheless, his final conclusion was that, under international law, the member States of the ITC are not liable to the organization's creditors: p. 1148d-e; p. 351a.

²¹² Loc. cit. (preceding note).

²¹³ p. 1127c; p. 333f.

²¹⁴ p. 1091h; p. 304e (the text of the *All England Report* erroneously reads 'art 60 (3) (b)', rather than 'art 60 (2) (b)'). Under Article 17 (1), two accounts are to be kept by the ITC—an administrative account and a buffer stock account. The operation of these accounts is governed by separate chapters of the ITA—Chapters IX and X, respectively—, as is their liquidation and winding-up—Articles 26 and 60 (2) (b) (c) and (g). The obligations of the member States to contribute to the administrative account are laid down in Article 17 (2), while their obligations to contribute to the buffer stock account are contained in Articles 21 and 22 (1) – (5) and (7).

member States are not liable for the ITC's debts, this is, *prima facie*, an argument of the type *inclusio unius est exclusio alterius*. Since the ITA contains several provisions expressly regulating the liability of member States to make payments above and beyond their regular contributions to the organization's accounts, it is difficult to contend that they have any other obligations of that sort which are not mentioned by the treaty. That being so, it is difficult to maintain that the member States are liable in respect of obligations which the ITC cannot meet itself out of the buffer stock account, since no such duty is laid down in the ITA. Indeed, the inference that no such liability exists is made all the stronger by the fact that, as Kerr LJ pointed out, in contrast with the silence which prevails in respect of the buffer stock account, express provision is made in respect of the administrative account by Article 60 (2) (b) for the liability of the member States upon the winding-up of the ITC to make available sufficient funds to facilitate the discharge of those liabilities which cannot be met out of the resources at the disposal of the organization.²¹⁵ However, despite initial appearances, this does not seem to have been Kerr LJ's argument; for, in a passage immediately subsequent to that just quoted, he deliberately eschewed reliance on the proposition that the only financial obligations imposed on the member States are those which are stated expressly in the ITA, remarking that '[i]t may be, of course, that those [obligations] referred to expressly should not be regarded as exhaustive', and admitting that '[t]here may be additional implied obligations . . . in international law'.²¹⁶

In this respect, Kerr LJ was followed by the rest of the Court of Appeal. Both Gibson and Nourse LJJ recognized the possibility that the member States might have financial liabilities in respect of the operation of the ITA over and above those which are expressly mentioned in that treaty. In particular, both recognized that, despite the fact that, in respect of the buffer stock account, there is no provision equivalent to Article 60 (2) (b), this does not exclude the possibility that the member States are nevertheless obligated to bear the cost of those liabilities which the ITC incurs in the course of buying and selling tin and which cannot be met out of the assets which are at the organization's disposal. Nourse LJ thus held:

articles 26 and 60, which together prescribe a winding-up procedure on termination of the agreement (including the liquidation of the buffer stock), assume that there will then be a surplus of assets over liabilities, except, it is true, in regard to the obligations towards staff: article 60.2 (b). I think it would put altogether too great a burden on that single provision . . . to say that it impliedly relieves the members of any . . . obligation . . . to cover a deficit on the buffer stock account. There is no word of how a deficit on the latter account is to be met and certainly no suggestion that it is not to be met at all.²¹⁷

Gibson LJ shared this opinion. While noting the 'conspicuous' absence from the ITA of any provision dealing with the satisfaction of liabilities which cannot be met out of the buffer stock account,²¹⁸ he nevertheless recognized there to be 'at the very least an arguable case under what I would hold to be the relevant rule of international law and the proper construction of the [ITA]' that the member States are bound to provide sufficient funds to enable those liabilities to be met.²¹⁹

²¹⁵ p. 1091d; p. 304a-b.

²¹⁶ p. 1091h; p. 304f.

²¹⁷ pp. 1124h-1125b; p. 331g-h.

²¹⁸ p. 1148f; p. 351b-c.

²¹⁹ p. 1151f; p. 353f. See nn. 236-40, below.

It was, therefore, not the ITA's silence concerning deficits in the operation of the buffer stock account which moved Kerr LJ—and, presumably, Gibson LJ—to hold that the member States are not directly liable to the ITC's creditors for the debts which the organization might incur in the course of the buying and selling of tin. Rather, what was 'crucial' in leading Kerr LJ to that conclusion was another, second, feature of that treaty:

all references to contributions, payments or other obligations on the part of the members show that no more was contemplated than obligations by the members *towards the council*. . . . [The ITA] nowhere envisages any liability by the members to anyone other than the council or the members inter se. There is nothing which points to the assumption of any obligation to any creditor of the council. On the contrary, everything points in the opposite direction.²²⁰

Kerr LJ's argument was not based on the notion that there is a mutual incompatibility between the member States being liable financially both to the ITC and to the organization's creditors. As Nourse LJ pointed out,²²¹ in so far as the ITA places the member States under financial obligations to the ITC, the evident purpose is to put at the disposal of the organization funds sufficient to enable it to discharge the liabilities which it might incur; and, to this extent, the relevant provisions of that treaty, and especially Article 60 (2) (b), indicate that the ITC's assets are to represent 'the primary source' for meeting the organization's liabilities. However, the existence of these obligations does not necessarily exclude the possibility that, if there are insufficient resources in the hands of the ITC, its member States bear a secondary liability directly to the organization's creditors. Even if, as Gibson LJ thought,²²² the member States owe to the ITC in respect of liabilities incurred in the operation of the buffer stock an obligation similar to that laid down in Article 60 (2) (b), that is unlikely to guarantee that the ITC in fact receives money sufficient to enable it to discharge those debts; for the Council of the ITC is composed of nothing more nor less than the representatives of the member States, and they are most unlikely to vote in favour of the organization taking action to demand many millions of pounds from them.²²³ It would hardly be superfluous, therefore, if there were to exist some means whereby the ITC's creditors might have recourse directly against the member States to recover their debts when the organization itself has failed to make repayment.

Rather, Kerr LJ's contention was that the express provisions of the ITA make it evident that the whole scheme of that treaty is that it is to the ITC that the financial obligations of the member States are owed. The presence of certain provisions expressly regulating the financial liabilities of the member States does not preclude their subjection to further monetary obligations not mentioned in the ITA. However, just as any financial obligations which are imposed under the express terms of the ITA are owed to the ITC itself and not to the organization's creditors, so it must be with any obligations which exist alongside and unmentioned by that treaty. Thus Kerr LJ, together with Gibson LJ, recognized it as possible that the member States are indeed liable for the debts which the ITC has incurred in the course of the operation of the buffer stock, even though no such duty is stipulated in the ITA; but, like Gibson LJ, he nonetheless emphasized that, in accordance

²²⁰ pp. 1091h and 1092b; p. 304f and g (emphasis in original).

²²¹ p. 1124f-g; p. 331e-f.

²²² pp. 1149e-f and 1151f; pp. 351j-352a and 353f.

²²³ Cf. Gibson LJ at p. 1151f-h; p. 353f-g.

with the system adopted by the ITA, any such obligations would be owed not to the plaintiffs, but to the ITC alone.²²⁴

Nourse LJ did not share this conviction. He observed that all the financial obligations expressly imposed on the member States by the ITA 'appear to me to be concerned only with the internal regulation of the ITC's financial affairs between its members'.²²⁵ Even Article 60 (2) (b) merely regulates the internal relations between the ITC and its member States, aiming to ensure that, if the ITC cannot fulfil its obligations to its staff out of the regular contributions to its administrative account, it will nevertheless be put in funds by the member States in order that it can meet its liabilities. The question of what, if any, obligations are imposed on the member States in the external domain of relations with the ITC's co-contractors and creditors is simply not dealt with; and, if there is nothing in the ITA which expressly subjects the members to such liabilities, 'there is nothing to exclude or limit it', either.²²⁶

For Nourse LJ, the question, therefore, became one of whether there is anything in the ITA which is positively indicative of the member States' liability to the ITC's creditors for debts incurred by the organization in the course of the operation of the buffer stock. His Lordship thought that there is, pointing to three major factors supportive of such liability. First, although, unlike the arbitrators in the *Westland Helicopters* case, he did not think it possible to say that 'the ITC is in reality one with the member states', he considered that 'they nevertheless retain an extensive participation and control in its affairs',²²⁷ 'all important decisions in regard to the affairs of the ITC, not least in regard to the management of the buffer stock operations' being 'reserved to the council (i.e. to the members) or its subsidiary bodies', rather than being left to the executive chairman or the buffer stock manager.²²⁸ Nourse LJ felt 'that must be a factor which points strongly towards [the members'] liability for [the ITC's] obligations'.²²⁹ Secondly, and of 'special significance', was the regulation for the operation of the buffer stock which is contained in Article 28 (3) (e) of the ITA. Subject to the instructions of the Council, this provision enjoins the manager of the buffer stock, when the market price of tin is equal to or less than the floor price,²³⁰ to buy tin, if he or she has funds at his or her disposal, until the market price exceeds the floor price or the funds at his or her disposal are exhausted. In view of this provision, Nourse LJ thought it to follow that 'anyone who sold tin to the ITC under such conditions would be entitled to assume either that the manager had funds at his disposal or, if he did not, that the council had instructed him to buy tin without having funds at his disposal'.²³¹

²²⁴ pp. 1091h-1092b; p. 304f-g.

²²⁵ p. 1124f; p. 331e.

²²⁶ p. 1125a-b; p. 331h-j.

²²⁷ p. 1126e; p. 333a.

²²⁸ p. 1125c; p. 331j.

²²⁹ p. 1126e-f; p. 333a. Cf. text at nn. 365-6, below.

²³⁰ For the setting of the floor price, see Article 27.

²³¹ p. 1125e; p. 332b. See also p. 1126g-h; p. 333c. It might be thought that the proviso which prefaces Article 28 (3) (e) and subjects the rule therein laid down to the contrary instructions of the Council has the purpose solely of empowering the Council to order the buffer stock manager not to buy tin, despite the fulfilment of the other conditions for the application of the duty imposed on him or her by that provision. However, the proviso in question qualifies not just the injunction to buy tin but also the precondition to the existence of that duty which consists in the availability of funds to the buffer stock manager. Moreover, if that were the sole purpose of the proviso, it would be redundant, since, not only

Indeed, he thought that anyone giving credit at any time to the ITC on its buffer stock operations would be entitled to make such an assumption.²³² The third factor to which Nourse LJ pointed was that, in spite of the ease with which they could have done this, the drafters of the ITA did not expressly exclude or limit the liability of the member States for the obligations of the ITC.²³³

It is doubtful whether these three factors do on their own support the inference which Nourse LJ drew from them. Thus the close involvement of the member States in the administration of the ITA and the management of the buffer stock is perfectly compatible with the sole liability of the ITC for the obligations undertaken in its name, as is the fact that those selling tin to the ITC were legitimately able to assume that, if the buffer stock manager did not have sufficient funds immediately available to finance a purchase, payment would nevertheless be forthcoming, the transaction having been completed on the instructions of the member States in accordance with Article 28 (3) (e). Likewise, while it would have been a simple thing for those drafting the ITA to insert a clause excluding the liability of the member States to the ITC's creditors, they could just as easily have included a provision imposing such liability.

Notwithstanding the ambivalence of those features of the ITA on which he relied, Nourse LJ pointed to a further, additional, consideration in support of the liability of the member States—one whose cogency is less open to doubt: namely, the demands of justice, reason and propriety.²³⁴ As Article 28 (3) (e) makes clear, the ITC might well come to trade on credit, as a result of which it might happen that the organization did not possess the funds to satisfy its financial liabilities to its creditors. This might occur as a result of an instruction issued by the Council to the buffer stock manager to buy tin in spite of his or her lack of funds, as Nourse LJ pointed out. It might also occur in the absence of any such instruction if the buffer stock manager were to understand that there were 'funds at his disposal' in the sense of that provision as long as he or she were able to trade on credit by offering tin warrants as security for future payment, and if the price of tin were then to fall to such a degree as to make the value of the tin so pledged insufficient to cover the ITC's financial liabilities. Such a collapse in the market price of tin might bring about a similar result if the ITC were to exercise its power under Article 24 (1) to borrow upon the security of tin warrants in order to finance the operation of the buffer stock.²³⁵ It was, therefore, quite conceivable that, whilst operating in

does the ITA spell out in a separate provision the power of the Council to do such a thing (Article 29 (2)), but Article 28 (3) (e) itself also contains a second, distinct proviso explicitly referring to that very provision.

²³² p. 1125e; p. 332b–c.

²³³ p. 1126h; p. 333c. Furthermore, Nourse LJ inferred from Article 16 (2) of the ITA and Articles 2 and 3 of the Headquarters Agreement that the purpose for which the ITC is to be invested with municipal legal personality is not to shield its members from liability for its transactions, but rather to enable the organization the better to perform its functions in so far as they involve activities which are to be conducted at the level of municipal law: pp. 1125h–1126a, 1126d and 1128c; pp. 332f and j and 334e.

²³⁴ p. 1128c and e–f; p. 334d and f–g.

²³⁵ This is, in fact, precisely what occurred on—and because of—the collapse of the ITC. For example, one of the plaintiff banks, Australia and New Zealand Banking Group Ltd., several days before the ITC ceased trading, lent the organization £10 million on the security of tin warrants or warehouse receipts. When the date for repayment came, the ITC defaulted. The tin held as security was then sold, but, the market price having fallen drastically in the interim, it realised only £5.7 million. See Staughton J at p. 674a–b.

accordance with the ITA, the ITC might come to have financial liabilities which it might not be able to meet out of the funds currently held in its name. Yet it is hardly imaginable that those trading with the ITC were not to be able to recover the money owed to them in such circumstances; for, if the organization were to be able to hold itself out as able to trade in such a fashion and in such circumstances, then those trading with it must have been entitled to expect payment from it. If such obligations are to be met, it follows that, since the ITC itself might have no funds at its disposal, the member States must be liable to pay, even though no such obligation is spelled out in the ITA. Furthermore, as Nourse LJ pointed out, in view of the fact that the member States wield a large degree of control over the operation of the buffer stock and that they themselves might thus be directly responsible for causing the ITC to be put in a position of potential default on its obligations, there is little objection to fixing them with such liability.

It was not only Nourse LJ who felt the cogency of these considerations of 'justice and reason'. Gibson LJ, too, was moved by the plain requirements of '[o]rdinary concepts of justice'.²³⁶ Thus he held that

if members of an international organisation can and do cause it to trade on credit, principle should impose a liability [on them] to indemnify the organisation in respect of the debts which it has been caused to incur unless the nature of the organisation, under its relevant law, provides otherwise. In the absence of an effective rule or provisions in the constituent document excluding that obligation to indemnify, international law should, in accordance with general principle, retain the liability of members in respect of it.²³⁷

Turning to the ITC itself, Gibson LJ thought that its members are, 'in probability', under such a liability²³⁸—an assessment with which Kerr LJ agreed.²³⁹ However, Gibson LJ apparently believed that the demands of justice would be satisfied if the member States were to owe to the ITC an obligation to pay into its hands funds sufficient to enable it to discharge its liabilities to its creditors.²⁴⁰ It was not necessary for the member States to be under a duty of any sort to the creditors themselves, who would therefore have to look to the ITC alone for the repayment of their debts. Nourse LJ, on the other hand, considered that an obligation of this kind would not ensure that justice was done and the creditors protected. To enforce such an obligation against its member States, the ITC would need an affirmative decision of its Council; yet, since the Council is composed of the representatives of the member States themselves, it might well not be willing to require of them sums running into many hundreds of millions of pounds.²⁴¹ Gibson LJ sought to counter the consequent objection that liability of the member States to the ITC would little avail the organization's creditors by pointing out that, even if the ITC were to fail to invoke it, such liability might nevertheless provide them with a basis for the recovery of their debts:

if an individual member state considered that its citizens, or their companies, had suffered damage by reason of a breach of the international obligations to put the ITC in funds to

²³⁶ p. 1131f; p. 337b.

²³⁷ p. 1149e-f; pp. 351j-352a.

²³⁸ p. 1131e-f; p. 337a-b. He elsewhere remarked that there is 'at the very least an arguable case' that they are so liable: see text at n. 219, above.

²³⁹ Loc. cit. above (n. 224).

²⁴⁰ See passage quoted at n. 237, above. See also text at n. 219, above.

²⁴¹ See text at n. 223, above.

meet its debts, that member state could advance an international claim to recover compensation on their behalf.²⁴²

However, even if this were so, it would not afford the ITC's creditors any guarantee of recovery. The State of nationality of such a creditor might well decline to take up his or her case on the international level for the very same reason that it failed to vote in favour of the ITC enforcing its rights against the member States: namely, that, if it were to recover the money owed to its national from one or more of the other member States,²⁴³ they in their turn might seek to recover a contribution from that State, it being liable along with them to put the ITC in funds and having equally failed to do so. A potential claimant State would thus be deterred by the prospect that, by claiming, it would make itself liable. Moreover, such liability might stretch beyond the obligation to pay a proportion of the sum owing to its national, since, by opening up the question of the failure of the ITC to meet its obligations to its creditors, it might encourage similar claims from other member States. Consequently, while, in some cases, the obligation postulated by Gibson and Kerr LJ might suffice to protect the ITC's creditors, the only means by which they can be assured of the recovery of their debts is by according to them a right to require the member States themselves to make repayment.

Nourse LJ held that the liability which international law therefore imposes on the member States is secondary in nature, arising only once the ITC has failed to discharge its obligations to its creditors.²⁴⁴ Inasmuch as the ITA places on the member States a series of financial obligations to the ITC, Nourse LJ recognized that the assets held in the name of the organization are to be 'the primary source for meeting its obligations'.²⁴⁵ This was indicated in particular by Article 60 (2) (b) of the ITA; for, by enjoining the member States to pay into the hands of the ITC funds sufficient to meet its obligations to its staff when those liabilities cannot be met out of the funds currently available in the administrative account, that provision presupposes that the principal source to which the organization's creditors are to look for payment is the organization itself.²⁴⁶ Nevertheless, if that principal source were to fail, then, in accordance with the demands of justice, they might turn to the member States to recover their debts.²⁴⁷

Nourse LJ did not express any opinion on the conditions which need to be fulfilled for a creditor's primary means of recourse to be deemed to have failed and the member States' secondary liability to be triggered.²⁴⁸ This question posed potentially formidable problems for certain of the claimants in the present action. As has

²⁴² p. 1151g; p. 353g.

²⁴³ *Quaere* whether that State would be estopped from making such a claim if it had not itself voted in favour of the ITC invoking its right to be put in funds by its member States.

²⁴⁴ p. 1127c; p. 333f. He added that the secondary liability of the member States is unlimited in amount and joint and several in nature: loc. cit.

²⁴⁵ p. 1124g; p. 331f. See also text at n. 221, above.

²⁴⁶ pp. 1124h-1125a; p. 331h.

²⁴⁷ That any liability which the member States might bear should be secondary in nature is further indicated by the problems which would ensue if it were concurrent with that of the ITC; for the member States would then be open at any time to harassment or suit by the ITC's creditors, whose actions would also tend to disrupt the orderly regulation of the organization's finances.

²⁴⁸ p. 1130h; p. 336f. Nourse LJ thought it unnecessary to do so, seeing that the majority of the Court of Appeal was of the opinion that the plaintiffs had no right of any kind to recovery from the defendant States. He also thought there to have been insufficient argument on the point.

already been observed,²⁴⁹ of the plaintiffs, all of the brokers and one of the banks have either obtained arbitral awards against the ITC or are in a position to do so, having arbitral clauses in the contracts which they concluded with the ITC. In the case of five of the banks, however, no such clause appears in the loan agreements which they made with the ITC, and they, therefore, cannot obtain arbitral awards in their favour against the organization. Kerr LJ felt that if, contrary to his opinion, international law imposes a secondary liability at municipal law on the member States of the ITC, it would little avail these five banks, since, being unable to obtain an arbitral award in their favour against the ITC, they would be unable to take against the organization steps to recover their money which would be sufficient to trigger the secondary liability of the member States.²⁵⁰ Kerr LJ based this view on the ITC's Headquarters Agreement, presupposing that, in so far as this treaty was concluded by the ITC itself, the regime which it contemplates for that organization under English law reflects the legal nature which it possesses under the ITA. The ITC is obligated by Article 23 of the Headquarters Agreement to insert arbitration clauses in the contracts which it concludes with persons resident in the UK and bodies incorporated in or having their principal place of business in that country. Article 8 (1) provides that the ITC is to enjoy immunity from the jurisdiction of the UK's courts except, *inter alia*, in respect of proceedings for the enforcement of an arbitral award which has been made against it under Article 23. Kerr LJ considered these provisions to indicate that, if the member States are directly answerable to the ITC's creditors for the organization's debts, their liability is nevertheless secondary in nature, and that primary liability is borne by the ITC alone; for they presuppose that the sole principal means of recourse for a creditor is to proceed against the ITC itself, by availing itself first of the arbitration clause inserted in its contract with the organization pursuant to Article 23, and then enforcing against it the award obtained in its favour by taking advantage of the exception created by Article 8 (1) (c) to the immunity which the ITC otherwise enjoys from the enforcement jurisdiction of the UK's courts.²⁵¹ It would, therefore, only be when this last step failed to yield the money due to it that a creditor might turn to the member States for payment and invoke their secondary liability. Whereas the nine brokers and one of the banks would be able to satisfy this precondition and so invoke the direct liability of the defendant States, the five banks without arbitral clauses in their loan agreements would not, being unable to obtain an arbitral award in their favour against the ITC.²⁵²

It is doubtful whether Kerr LJ's conclusion is well-founded. If his point of view were to be adopted, it would be impossible in any circumstances for foreign creditors to invoke before UK courts the liability of the member States, since Article 23 of the Headquarters Agreement imposes no obligation on the ITC to insert

²⁴⁹ See text at nn. 11, 13 and 15, above.

²⁵⁰ p. 1105d-f; p. 315d-f.

²⁵¹ p. 1086e; p. 300b-c.

²⁵² p. 1105e-f; p. 315e. The banks' only, forlorn, hope of triggering the defendant States' secondary liability was that the ITC might waive its immunity from the adjudicatory and enforcement jurisdiction of the English courts, so enabling them, by virtue of Article 8 (1) (a) of the Headquarters Agreement, to obtain the judgment of a court in their favour and to try and fail to recover it out of the ITC's assets.

arbitration clauses in the contracts which it concludes with such persons and entities.²⁵³ Moreover, through no fault or choice of its own, a UK-based creditor might be deprived of the protection afforded by the residual, secondary liability of the member States if, as indeed happened in the case of the five banks, the ITC were to breach its obligation under Article 23 of the Headquarters Agreement by failing to insist on the insertion of an arbitration clause in the agreement between itself and that creditor. Kerr LJ sought to mitigate the harshness of this potential consequence of his conclusion by pointing out that, in such a case, the UK would be able to bring a diplomatic claim against the ITC for the resulting prejudice occasioned to the creditor.²⁵⁴ However, this remedy is likely to provide little practical protection to such a creditor for reasons already discussed.²⁵⁵ Furthermore, while Articles 8 (1) (c) and 23 of the ITC's Headquarters Agreement might well reflect the fact that primary liability for the ITC's debts rests with the ITC rather than the member States, they hardly exclude the possibility that the secondary liability of the members, if it exists, might become operative at some stage prior to the exhaustion of the avenues of recourse which they envisage. While those articles might assume that the usual means by which a debt is to be recovered is by arbitration and judicial enforcement of the ensuing award, it would be utterly pointless for a creditor to labour punctiliously through that process if the ITC were unable to discharge its debt and the member States had made clear that they would not put it in funds whatever might occur. In such a case, the creditor should be able to invoke the member States' secondary liability immediately and not be obliged to go through the futile and fruitless process of obtaining and unsuccessfully enforcing an arbitral award. The same should occur if, as in the present case, the primary liability of the ITC affords no realistic prospects of recovery because there are no legal means at all which are available to enforce it. Surely, the very purpose of the secondary liability of the member States, if it exists at all, is to provide the ITC's creditors with the residual guarantee of payment which justice demands when satisfaction cannot be obtained through the principal means of the ITC's primary liability; and satisfaction is unobtainable through those means when, by the very fault of what is meant to be the principal source of recovery itself, a creditor is denied the legal mechanisms necessary to enable it to enforce its rights against that source.

Not only were their Lordships therefore in disagreement as to the regime which international law lays down to govern the member States' liability to the ITC's creditors, but they also disagreed on the pertinence of the position at international law to the regime which applies on this subject in English law.

It is a well-known principle of English law that treaties do not automatically create rules of English law:²⁵⁶ that is, among the rules governing the sources of English law, there is no master-rule which has the effect of creating rules of English law with a content identical to that of the UK's treaty commitments. All of their

²⁵³ Bingham J pointed to this fact to justify rejecting an argument, somewhat similar to that espoused by Kerr LJ, which was advanced by the ITC in *Standard Chartered Bank v. International Tin Council*: see last year's volume of this *Year Book* at p. 405.

²⁵⁴ Though not all of those persons and companies in respect of which the obligation created by Article 23 applies come within the categories of persons and companies on behalf of which the UK is usually ready to espouse a diplomatic claim.

²⁵⁵ See text at nn. 242-3, above.

²⁵⁶ See text at nn. 345-64, below.

Lordships acknowledged the validity of this general principle. Kerr LJ thus observed that 'since . . . treaties have no legislative effect, they do not form part of the law of this country',²⁵⁷ and Gibson LJ recognized that:

the provisions of [a] . . . treaty cannot be relied on by a claimant as effecting some change in the law of this country or as providing a cause of action not otherwise afforded by our law.²⁵⁸

Consequently, if the UK concludes a treaty which envisages the application of rules of English law differing from those currently in force, legislation is needed to enact those rules if English law is to reflect the UK's treaty commitments.²⁵⁹

The only legislative instrument in force in English law relating to the ITC is the 1972 Order in Council. It contains no provision expressly regulating the liabilities under English law of the ITC's member States, nor does it contain any provision which in so many words enacts into English law the regime governing the liability of the ITC's member States which is laid down in the ITA. Therefore, if that regime was to be at all relevant to the determination of the regime which applies under English law, it was necessary either to point to some stipulation in the 1972 Order which might be construed in such a way as to implement the relevant parts of the ITA, or else to find some exception to the general principle that treaties do not by themselves create rules of English law. Kerr and Nourse LJ concluded that it was possible to do one or the other of these things. Gibson LJ, however, did not.

Kerr LJ acknowledged that, if Article 5 of the 1972 Order is understood in the light of general principles of English law, it inevitably follows from the fact that that provision confers on the ITC independent legal personality that its member States are not liable to its creditors for debts contracted in its name.²⁶⁰ To adopt such a reading of the Order would result in the application to the ITC of a regime governing the liability of its members which would coincide with that which Kerr LJ thought to be stipulated by the ITA. However, this would be purely fortuitous, and Kerr LJ accordingly considered that the nature of the existence which the ITC enjoys under English law should be determined not simply by interpreting the 1972 Order as if it were a normal English statutory instrument, disregarding the position at international law. Rather, it should be directly determined by the ITA itself, English law reflecting the regime stipulated in that treaty. Admittedly, in the case of the ITC, the end result of the latter approach was the same as that which would have been reached by applying the former: namely, that the ITC's member States are not directly liable to the organization's creditors for the payment of its debts.²⁶¹ Nevertheless, Kerr LJ's approach is highly significant; for it follows that, if it were shown that Kerr LJ was mistaken in his interpretation of the ITA and the plaintiffs' construction of that treaty were to be preferred, then the member States could indeed be held liable to the ITC's creditors before the English courts, notwithstanding that the organization possesses independent legal personality at English law, in spite of the fact that the 'mixed' nature which the ITC would thus enjoy would represent a form of existence otherwise unknown in contemporary English

²⁵⁷ p. 1075g; p. 291g. See also p. 109of; p. 303e.

²⁵⁸ p. 1156c-d; p. 357e. See also pp. 1146f and 1147a; p. 349e and j.

²⁵⁹ Gibson LJ at p. 1147d; p. 350b.

²⁶⁰ See text at nn. 145 and 153-4, above.

²⁶¹ Thus Gibson LJ, who applied the former approach, agreed with Kerr LJ that the plaintiffs' second argument failed: see text at nn. 296-7, below.

law, and even though there is nothing in the 1972 Order in Council which prescribes or envisages it.²⁶²

Kerr LJ based his approach upon notions borrowed from the conflict of laws. He acknowledged it to be an established principle of English private international law that the form of existence enjoyed by an incorporeal legal person under English law, including the regime which regulates the liability of its members for its debts and engagements, is determined by the rules of the legal system under which that 'corporation' was formed and by the regulations embodied in its constituent instrument.²⁶³ While recognizing that this principle has so far been applied by English courts only in respect of bodies constituted under the municipal laws of foreign States,²⁶⁴ Kerr LJ considered it to be applicable also in respect of bodies created under and within the international legal system.²⁶⁵ To ascertain the regime which governs the member States' liability at English law for the ITC's debts, it was, therefore, necessary to look to the ITA 'as though it were the constitution of a foreign corporation',²⁶⁶ reading it in the light of the general principles of international law, that being the system of law under which the ITC was constituted.²⁶⁷ Kerr LJ added that the application to the ITC of this principle of private international law is not precluded by the 1972 Order. That instrument contains no provision regulating the liability of the member States, and so does not displace the application of the general principles of the conflict of laws:

article 4 of the order tells us no more than that the ITC is 'an organisation' in international law, and article 5 does no more than to confer 'capacities' on this organisation without purporting to define, or to alter, its legal nature in any way, whatever this might be.²⁶⁸

Consequently, to ascertain the regime which governs the liability under English law of the States members of the ITC, it was both possible and necessary to refer to the system of law under which the ITC was formed and to examine the ITA against the background of general international law.²⁶⁹ There was, as it were, a gap in the 1972 Order in which the principles of the conflict of laws could operate.

Kerr LJ was fully aware that his approach conflicted with the familiar doctrine that treaties do not of themselves create rules of English law;²⁷⁰ but, in so far as this was so, he held that 'this doctrine must give way'.²⁷¹ 'Justice and good sense' required that the established principles of private international law should prevail.²⁷² He felt easier in recognizing such an exception to the principle of the 'non-justiciability of unincorporated treaties'²⁷³ for the reason that 'the limits of this

²⁶² The 1968 Act does not confer any power to incorporate a provision prescribing such a regime in orders in council issued under its aegis.

²⁶³ In support of this principle, Kerr LJ referred to *Dicey and Morris on the Conflict of Laws* (11th edn., 1987), vol.2, at p. 1134; p. 1089e; p. 302f-g.

²⁶⁴ p. 1089g; p. 302h; and see p. 1090e; p. 303d.

²⁶⁵ p. 1090d; p. 303c; and see p. 1056f and g; p. 275e and g.

²⁶⁶ p. 1091b; p. 303j.

²⁶⁷ p. 1092c; p. 304h.

²⁶⁸ p. 1076d-e; p. 292c. See also pp. 1060g-h and 1089h-1090a; pp. 278g and 302j.

²⁶⁹ p. 1076e; p. 292c; and see p. 1078b-c and d; p. 293g and h.

²⁷⁰ p. 1089c; p. 302e.

²⁷¹ p. 1090e; p. 303d.

²⁷² p. 1090g-h; p. 303f-g.

²⁷³ p. 1075d-e; p. 291d.

are not yet clearly drawn'.²⁷⁴ Not only do exceptions to it already exist,²⁷⁵ but also, as he observed, '[t]here has never been any occasion when its scope has fallen to be considered in a context like the present'.²⁷⁶ Moreover, his Lordship felt that 'the claims of the doctrine of non-justiciability are particularly weak in cases such as the present'.²⁷⁷ He thought this doctrine to find its justification in the principle of UK constitutional law that the power to make law resides almost exclusively with Parliament.²⁷⁸ Parliament's consequent legislative monopoly would be undermined if the Crown were able to create new rules of English law by the expedient of concluding a treaty—something which it may do without obtaining the consent of Parliament.²⁷⁹ Kerr LJ felt that 'no harm' would, therefore, be done if resort were had to the ITA in order to determine the member States' liability for the ITC's debts.²⁸⁰ Why he felt this, he did not explain; but it may have been because the consequent infringement of Parliament's legislative monopoly would be quite minor in extent—*de minimis non curat lex*. Certainly, it could not be said that the Crown was thereby permitted to make 'laws' of general import, but merely to make regulations applicable to the highly individualized case of a particular international organization. Furthermore, Kerr LJ thought the demands of the doctrine of 'non-justiciability' to be weak in the instant case for the reason that the Order of 1972 refers expressly to the ITC's Headquarters Agreement and the ITA, thus clearly countenancing reference to those treaties;²⁸¹ and, since the Order was issued under a statute enacted by Parliament and was itself approved by Parliament,²⁸² Parliament may, therefore, be thought to have authorized this.

The possible ramifications of Kerr LJ's approach should be noted. It is commonly assumed that, barring incorporation under the Companies Acts as a normal commercial company, an international organization cannot exist as a discrete legal person under English law without some form of legislative intervention being made in respect of it, either in the form of a specific statute or by means of an order in council issued under the International Organizations Act. However, Kerr LJ's judgment opens up the possibility that, by applying the principles of the conflict of laws, an organization might be held to enjoy personality within the English legal system, even though no such statutory intervention has taken place—provided, of course, that its constituent treaty, when interpreted in the light of general international law, contemplates its enjoyment of such a status. Certainly, the view has been taken by the Foreign and Commonwealth Office that, by applying the rules of private international law, English courts might accord legal personality to an

²⁷⁴ p. 1090f–g; p. 303e–f. See text at nn. 345–64, below.

²⁷⁵ Treaties regulating matters in respect of which it lies within the prerogative of the Crown to legislate can automatically create rules of English law: *Post Office v. Estuary Radio*, [1968] 2 QB 740, [1967] 3 All ER 663, *per* Diplock LJ at pp. 753e, 755c and 756f–g; pp. 680c, 681c–d and 682c–d. For the rationale of this exception, see n. 279, below.

²⁷⁶ p. 1090e; p. 303d.

²⁷⁷ p. 1090h; p. 303g.

²⁷⁸ p. 1090g; p. 303f.

²⁷⁹ The exception to the doctrine of 'non-justiciability' cited in n. 275, above, is thus readily explicable. To give the category of treaties embraced by that exception automatic effect within English law does not undermine the exclusive right of Parliament to make law on the subjects with which they deal, since Parliament enjoys no such right in their regard.

²⁸⁰ p. 1090g; p. 303f.

²⁸¹ p. 1090h; p. 303g. See also pp. 1074a and 1076g; pp. 290c and 292e.

²⁸² See text at n. 119, above.

international organization which enjoys legal personality under the laws of another State;²⁸³ and, if Kerr LJ was right to believe that the doctrines of the conflict of laws permit *renvoi* to be made to the international, as much as to foreign, legal systems, then, in principle, an English court might do the same in respect of an organization whose municipal legal personality is prescribed by international law. However, it is arguable that such a thing cannot be done; for, if international organizations were to be recognized to possess personality at English law simply because international law envisages their so doing, then the power contained in Section 1 (2) (a) of the International Organizations Act to issue orders in council granting that attribute to them would be made redundant.²⁸⁴ Thus, even if it were theoretically justifiable to apply notions of the conflict of laws in the manner suggested, the operation of those notions has been displaced, at least in so far as they might serve to confer legal personality on an international organization, by the creation of a statutory power to regulate that very subject. Certainly, if an order in council were to be issued under the 1968 Act which did not embody the formula laid down in Section 1 (2) (a), it would be hard to contend that the organization in question enjoyed legal personality under English law by virtue of the principles of private international law.

Moreover, some doubt may be felt as to whether Kerr LJ was right in assuming that he could apply the principles of private international law in the way that he did to the case of an international organization such as the ITC. The particular principle on which Kerr LJ relied determines the content of the rules of English law which regulate the liability of the members of a foreign corporation by making a *renvoi* to the rules which govern that matter in the legal system under which that corporation was constituted. As such, it is quite capable of being applied to the case of an international organization which enjoys juridical personality within the municipal legal system of a foreign State: as in the more normal case of a foreign company, the organization enjoys a discrete legal existence under the foreign State's legal system, and the rules of that system governing the liability of its members for its debts are referred to and 'borrowed' by English law. In contrast, while international law might envisage the existence of an international organization as a juridical person of municipal law and might also lay down the regime which is to govern its member States' liability for its debts in municipal law, the organization does not exist within the international legal system as a legal person of municipal law, and, within the international legal system, its members bear no municipal law liability for the organization's municipal law obligations. In short, no municipal legal person exists under international law whose attributes and characteristics can be referred to and 'borrowed' by English law. International law cannot create an organization as a person of municipal law: that can only be done by municipal law itself; and all that international law can do is to seek to determine the way in which municipal law does this. Therefore, in the terms of the principle of private international law relied on by Kerr LJ, public international law is not the legal system under which the ITC is incorporated *qua* entity of municipal law, even if it is the

²⁸³ Letter from the Minister of State, Foreign and Commonwealth Office, to the Deputy Governor of the Bank of England, dated 8 May 1978: see this *Year Book*, 49 (1978), at pp. 346-8.

²⁸⁴ Millett J hinted at such an argument in his judgment in *Maclaine Watson & Co. Ltd. v. International Tin Council*: see last year's volume of this *Year Book* at p. 408 n. 31. Kerr LJ's approach would also make redundant the provisions granting legal personality contained in statutes enacted to deal with certain specific organizations.

system under which the ITC is constituted *qua* person of international law. The relevant system—or class of system—is, rather, municipal law itself.

Doubt may also be felt as to the cogency of the additional considerations on which Kerr LJ relied to bolster his argument for making an exception to the principle of the ‘non-justiciability’ of treaties. Thus, far from representing a minor and unimportant derogation from the legislative monopoly of Parliament, if treaty provisions governing the liability of the member States of international organizations were automatically to have effect as rules of English law, then there could be introduced into English law, without Parliamentary sanction, rules which might well have considerable financial implications for the UK Government and for UK-based traders, as the collapse of the ITC makes clear. As for the fact that certain provisions of the 1972 Order expressly or by necessary implication require reference to be made to the ITA in order to determine their true effect, this hardly proves that provisions of the ITA not even mentioned by the 1972 Order can be considered by themselves to have caused the creation of new rules of English law. It may be, as Kerr LJ remarked, that the ITA represents ‘an unprecedented hybrid situation between an incorporated and wholly unincorporated treaty’;²⁸⁵ but, merely because a statutory instrument has created new rules of English law the contents of which are based on certain of the provisions of a treaty,²⁸⁶ it does not follow that other provisions of that same treaty, to which no reference is made in that statutory instrument, can have automatic effect in English law in disregard of well-established principle.

Nourse LJ shared with Kerr LJ the conviction that, to determine whether the States members of the ITC are liable to the organization’s creditors under English law, reference must be had to the position at international law, the content of the relevant rules of English law being fixed by the regime which the ITA envisages will apply in municipal law. Unlike his colleague, however, Nourse LJ did not appeal to novel arguments drawn from the conflict of laws to justify making such a *renvoi*; rather, he relied on the more familiar ground that the relevant rules of international law embodied in the ITA have been incorporated into English law by a legislative instrument—namely, the 1972 Order.

Like Kerr LJ,²⁸⁷ Nourse LJ considered that, while Article 5 of the 1972 Order grants juridical personality under English law to the ITC, it does no more than this, and, in particular, it contains nothing to regulate the liability of the organization’s member States. Article 5 simply provides that ‘the legal capacities of a body corporate’ are to be enjoyed by ‘[t]he Council’, without attempting in any way to define the nature of that body or to grant it a form of existence under English law different from that which international law stipulates that it is to enjoy in municipal law.²⁸⁸ Nourse LJ thus held that ‘the terms of article 5 suggest that it was deliberately expressed so as not to alter the nature of the ITC in any way’;²⁸⁹ and, that being so, it ‘cannot be taken to have any effect on the liability of the members of the ITC for its obligations’.²⁹⁰ However, if Article 5 does not create for the ITC a

²⁸⁵ p. 1090h; p. 303g.

²⁸⁶ For the provisions of the 1972 Order which do this, see p. 1076g; p. 292c.

²⁸⁷ See the passage from his judgment quoted at n. 268, above.

²⁸⁸ p. 1129c–d; p. 335c–d.

²⁸⁹ p. 1129c; p. 335c.

²⁹⁰ p. 1129d–e; p. 335d.

regime governing the liability of its members which is different from that laid down by international law, neither does it actually make that regime part of English law. This vital operation Nourse LJ held to be effected, not by Article 5, but by Article 4 of the Order. That article provides that '[t]he International Tin Council (hereinafter referred to as the Council) is an organisation of which Her Majesty's Government in the United Kingdom and the governments of foreign sovereign Powers are members'. By virtue of this provision, Nourse LJ held:

it is recognised, for the purposes of English law, that the ITC is an international organisation in international law. Such is the nature of the organisation which, by article 5 and for the purposes of English law, is given the legal capacities of a body corporate. . . . This means that we are directed, in the first instance, to a consideration of the nature of the ITC, and of the effect of its contracts, in international law. A consideration of these matters is, as I see it, mandatory.²⁹¹

Consequently,

an English court, in pursuance of the direction given to it by article 4 of the 1972 order, must attribute to the ITC's contracts such effect [in English law] as is currently assigned to them by international law.²⁹²

In sum, the 'combined effect' of Articles 4 and 5—the *renvoi* to international law made by the former and the failure of the latter to displace that *renvoi* by expressly providing what regime is to govern liability for the ITC's engagements—was to 'adopt' into English law,²⁹³ or 'make the necessary incorporation' of,²⁹⁴ the regime stipulated by international law under the ITA.²⁹⁵

Although Nourse LJ's judgment is thus founded in notions more orthodox than those espoused by Kerr LJ, some doubt must be felt about its soundness. Article 4 does not expressly adopt into English law any rules of international law, nor is there anything in that provision to betoken such a purpose. Indeed, rather than laying down any rules of law, it simply rehearses certain legal facts: namely, that the ITC is an international organization of which the UK and certain foreign States are members. The wording of Article 4 in fact reproduces that of Section 1(1) of the International Organizations Act, thus indicating that its true purpose is simply to testify that the ITC is an organization in respect of which the power exists under Section 1(2) of the 1968 Act to issue the order in council in which it is contained.

In contrast with both Kerr and Nourse LJ, Gibson LJ held that, whatever might be the position at international law concerning the liability in municipal law of the member States of the ITC, it was irrelevant to determining the rights of the organization's creditors at English law.²⁹⁶ To ascertain these, it was possible to rely

²⁹¹ pp. 1114h–1115b; p. 323g–h. See also p. 1116g–h; p. 325c.

²⁹² p. 1116c; p. 324h.

²⁹³ p. 1129g; p. 335f.

²⁹⁴ p. 1130c; p. 336a.

²⁹⁵ Nourse LJ indicated that he would have held the relevant rules of international law to form part of English law even if the 1972 Order had not adopted them: loc. cit. Although he did not explain the grounds on which he would have done this, it may be that he was thus intimating his support for an argument of the type favoured by Kerr LJ. Cf. the passage which Nourse LJ quoted from the writings of Seidl-Hohenveldern at p. 1120f–g; p. 328c–d.

²⁹⁶ This statement may need to be qualified somewhat: see text at nn. 334–8, below.

solely on the 1972 Order and the 1968 Act, read in the light of the general principles of English law; and, if this was done, the non-liability of the member States followed inexorably from the possession by the ITC of independent legal personality, as has already been seen.²⁹⁷

Although he accepted that the 1972 Order contains nothing expressly regulating the liability of the ITC's member States for the organization's debts,²⁹⁸ Gibson LJ held that it could not be maintained that, to deal with this deficiency, rules of English law had arisen on that subject modelled on the regime laid down under the ITA. To hold that this had happened in the absence of any provision to that effect in the 1972 Order would be to claim that rules of English law had been created by a treaty²⁹⁹—something inconsistent with the familiar principle that treaties do not by themselves create rules of English law.³⁰⁰ Although he did not expressly address the question,³⁰¹ Gibson LJ, therefore, implicitly rejected the idea, espoused by Kerr LJ, that notions borrowed from the conflict of laws might justify recognizing an exception to that principle in the instant case. He thus affirmed that the 'starting point' for a consideration of the relevance of the provisions of the ITA 'must be the rule relating to the use of unincorporated treaties in claims based on private law'.³⁰² Moreover, in contrast with Kerr LJ, who thought this precept to possess the more defeasible nature of a 'general principle'³⁰³ whose 'limits' are still 'not clearly drawn',³⁰⁴ Gibson LJ treated it as a firm 'rule', whose existence and scope is 'long established' and which is not subject to derogation.³⁰⁵

Gibson LJ further rejected the notion that, in spite of its apparent silence on the subject, the 1972 Order has in fact enacted rules regulating the liability of the ITC's member States based on those laid down in the ITA. His Lordship acknowledged that a statute can create rules of English law modelled on the UK's treaty commitments otherwise than by restating those undertakings in full. Thus, a statute might provide that a rule of English law exists whose content is to be ascertained by referring to a particular treaty provision. This might be done expressly. Thus, Article 2(1) of the 1972 Order defines the 'official activities' of the ITC for the purposes of Articles 8, 10, 12 and 13 of the Order by stipulating that they shall include the activities undertaken by the organization pursuant to the ITA.³⁰⁶ More interestingly, even in the absence of such express provision, Gibson LJ recognized that a statute might incorporate a treaty provision into English law 'by necessary implication' if this is the 'necessary effect of [the] legislation' in question.³⁰⁷ So, for example, even if no Article 2(1) had appeared in the 1972 Order, English law would still have defined the 'official activities' of the ITC for the purposes of Articles 8, 10, 12 and 13 of the Order by making reference to the relevant

²⁹⁷ See text at nn. 147–54, above.

²⁹⁸ p. 1146a–b; p. 349a. See also pp. 1133a–d, 1135g–h and 1143g; pp. 338d–f, 340f and 347b.

²⁹⁹ p. 1147a–b; p. 349j.

³⁰⁰ p. 1146b–c; p. 349b–d.

³⁰¹ He thus disregarded the plaintiffs' argument in favour of such an approach: p. 1145c–d; p. 348d–e.

³⁰² p. 1146b; p. 349a.

³⁰³ p. 1075g; p. 291f–g.

³⁰⁴ p. 1090f–g; p. 303e–f.

³⁰⁵ p. 1146b–c; p. 349a–b; and see p. 1146h; p. 349h.

³⁰⁶ p. 1147b–c; pp. 349j–350a.

³⁰⁷ pp. 1147b and c; pp. 349j and 350a.

provisions of the ITA.³⁰⁸ However, '[h]aving regard to the constitutional importance of the rule' that treaties do not by themselves create rules of English law, there must be shown a 'clear necessity' for such an implication before it will be made.³⁰⁹ In the instant case, Gibson LJ felt that there was nothing in the 1972 Order which could be construed to incorporate into English law the liability regime laid down by the ITA. In particular, and in contrast with Nourse LJ, he considered Article 4 to have no effect at all in determining the attributes and nature of the ITC under English law.³¹⁰ Moreover, he could see no 'clear necessity' for incorporating into the Order by implication the rules under the ITA dealing with the liability in municipal law of the ITC's member States; for, whatever the content of those rules might be, they imposed no obligations on the UK which were capable of breach by the application to the ITC of a regime different from that which they laid down.³¹¹

The last-mentioned proposition is especially worthy of note. Gibson LJ appears here to have been applying the principle in *Salomon's* case—namely, that legislation should be interpreted where possible so as not to put the UK in breach of its treaty obligations—and his judgment carries the clear implication that, if the UK had been duty-bound by the ITA to apply to the ITC a particular liability regime, then he would have at least considered holding that the 1972 Order incorporates that regime into English law. However, to apply that principle to a case such as the present represents something quite novel and raises important questions as to its relationship with the principle that treaties do not create rules of English law. The principle in *Salomon's* case is generally understood to apply when there exists in a statute a provision which is capable of being interpreted in two or more senses, of which at least one is consistent with the UK's treaty obligations and of which at least one other is inconsistent with them.³¹² It does not apply in a case such as the present, where a statute contains no provision at all to regulate a matter which is the subject of a treaty obligation; and to assume, as Gibson LJ appears to have done, that the principle nevertheless enjoins that such a statute be deemed to give effect to that treaty obligation is surely to use it as more than a principle of interpretation, and to elevate it, rather, into a source of law in derogation of the principle that treaty provisions do not form part of English law unless they are implemented by statute.

Interesting issues are also raised by Gibson LJ's suggestion that the UK is not under any international legal obligation as to the regime which applies in English law to regulate the liability of the member States to the ITC's creditors. Elaborating on this point, he stated:

the international obligation assumed by the United Kingdom was, in my view, limited to the provision for the ITC of separate legal personality and did not extend to the securing in English law of the enforceability of any other attributes of the international legal personality of the ITC^[313] which under international law might be derived from the terms of its then constituent document [the Fourth ITA]. That limit on the obligation assumed by the United

³⁰⁸ p. 1147c; p. 350a.

³⁰⁹ p. 1147d-e; p. 350b.

³¹⁰ p. 1146a; pp. 348j-349a.

³¹¹ p. 1147e-f; p. 350c-d. See also the passage quoted at n. 314, below, to which the passage here cited refers.

³¹² See text at n. 73, above.

³¹³ That is, the personality at municipal law which international law prescribes that the ITC is to enjoy.

Kingdom under [the Fourth ITA] and the Headquarters Agreement is apparent from the terms of the Headquarters Agreement of which article 3 says only that the council shall have legal personality. There cannot be derived from that provision any obligation to enact in this country any particular attributes of that personality whether concerned with liability or non-liability of the members.³¹⁴

In so far as this argument is based on the maxim *inclusio unius est exclusio alterius*, it is of doubtful force. The UK's obligations enumerated under the Headquarters Agreement do not exhaust those which it owes in respect of the ITC, for others are imposed on it by the ITA. Nor does the ITA itself enumerate all of the rules of international law which pertain to the ITC. Gibson LJ himself recognized this to be so; for, acknowledging as distinct the issues of the legal personality of an association and the liability of its members for its acts,³¹⁵ he held that, whereas the ITA expressly deals only with the former, rules of international law nevertheless apply to the ITC in respect of the latter: namely, the general principles of international law, in the light of which the ITA, like any treaty, must be read.³¹⁶ Gibson LJ thus did not deny the existence of any rules of international law relating to the liability of the ITC's member States; rather, he denied that they impose obligations on the UK to implement the regime which they lay down. Indeed, he went on to hold that, even in respect of those organizations whose constituent treaties expressly lay down a regime to govern the liability of their members to their creditors, the UK is under no obligation to ensure that that regime is applied in English law.³¹⁷

In this respect, Gibson LJ's judgment can usefully be contrasted with that delivered at first instance by Staughton J. As has already been seen, Staughton J, like Gibson LJ, held that the defendant States are not liable to the plaintiffs for the debts of the ITC. He based this conclusion on the straightforward ground that this followed from an interpretation of Article 5 of the Order of 1972 according to the natural and ordinary meaning of its terms.³¹⁸ However, he also held that it was necessary to adopt such an interpretation of that article if the UK was not to be put in breach of its treaty obligations.

Staughton J noted that, although no such provision is contained in the ITA, the constituent treaties of several international organizations expressly stipulate that member States are not liable under municipal law for the obligations of those organizations.³¹⁹ One such organization is the International Finance Corporation (the IFC), Article II(4) of whose Articles of Agreement provides that '[n]o member shall be liable, by reason of its membership, for obligations of the Corporation'.³²⁰ Staughton J considered this provision to impose an obligation on the members of the IFC, including the UK, to ensure that, under their national laws, the members of the organization should not be held liable for its debts. The order in council which regulates the position of the IFC under English law does not

³¹⁴ p. 1141g-h; p. 345f-h.

³¹⁵ p. 1133b-f; p. 338d-h; and see text at nn. 147-9, above.

³¹⁶ See text at nn. 210-12, above.

³¹⁷ See text at n. 326-9, below.

³¹⁸ See text at nn. 144 and 146, above.

³¹⁹ p. 696b-c. See text at nn. 171 and 173-84, above; though note also text at nn. 326-9, below.

³²⁰ Articles of Agreement of the International Finance Corporation, Washington, 1955: TS No. 37 (1961), Cmd. 1377; *UN Treaty Series*, vol. 264, p. 117.

contain anything expressly relating to the liability of its member States:³²¹ as in the case of the ITC, it simply confers on it, in familiar fashion, 'the legal capacities of a body corporate'. Yet Staughton J pointed out that, if that formula were interpreted in such a way that the members of an organization invested with those capacities were liable to its creditors, then the UK would be put in breach of its treaty obligations in respect of certain organizations to which that formula applies, such as the IFC.³²² Following the principle in *Salomon's* case, there was, therefore, good reason to construe the formula in Article 5 of the 1972 Order so as to shield the ITC's member States from liability to its creditors for its debts.

To point to provisions such as Article II(4) of the IFC's Articles of Agreement would have done little to establish the correct interpretation of the formula in Section 1(2)(a) of the International Organizations Act if the UK were obligated in respect of certain other organizations to which that formula applies to ensure that their members are in fact held liable for their debts. However, Staughton J held that the UK is under no such obligation. As has already been noted,³²³ Staughton J did not reach any conclusions as to the regime which general international law lays down to govern the liability at municipal law of the member States of an organization whose constituent treaty does not expressly regulate the question of their liability. Nevertheless, he considered that, whatever that regime might be, the UK would not be in breach of international law if the formula in Section 1(2)(a) were construed so as to exclude the liability of member States. On the one hand, if international law envisaged the non-liability of member States, the UK would be put in breach of international law if its law were to impose liability on them, just as it would cause the UK to be in breach of its express treaty obligations in respect of organizations such as the IFC.³²⁴ If, on the other hand, international law envisaged that States are liable for the debts of organizations to which they belong, the UK would, nonetheless, not commit any international wrong if its law shielded them from liability; for then the member States would simply have been granted a more advantageous position than that to which they were entitled under international law.³²⁵

Gibson LJ considered Staughton J to have been mistaken in thinking that the principle in *Salomon's* case favoured rejecting the plaintiffs' second argument. First, he disagreed with the proposition that provisions such as Article II(4) of the IFC's Articles of Agreement obligate member States to incorporate the principle of non-liability into their national laws.³²⁶ In respect of the IFC specifically, Gibson LJ considered that other provisions of the Corporation's Articles of Agreement exclude the possibility that Article II(4) imposes such an obligation on its member States.³²⁷ More generally, however, Gibson LJ indicated that provisions such as Article II(4), unless they say so in so many words,³²⁸ should not be deemed to impose an obligation on member States to ensure that their national laws shield the

³²¹ The International Finance Corporation Order 1955, SI 1955/1954. This order was issued under the International Finance Corporation Act 1955.

³²² pp. 696i-697a.

³²³ See text at n. 156, above.

³²⁴ pp. 696i-697a.

³²⁵ p. 696h-i. See also p. 696a.

³²⁶ Kerr LJ was of the same opinion. However, his reasons differed from those adduced by Gibson LJ: see text at n. 178, above, though note also text at nn. 183-4, above.

³²⁷ p. 1154b-c; p. 355g-j.

³²⁸ See the example of the Caribbean Food Corporation cited at nn. 181-2, above.

other members from liability for the organization's debts.³²⁹ Secondly, and express treaty provisions aside, in so far as he held that general international law imposes no obligations on the members of an international organization concerning the regime which applies in their national laws in respect of their liability for the organization's undertakings,³³⁰ Gibson LJ did not agree with Staughton J that, if general international law envisages the non-liability of member States, member States are duty-bound to ensure that their laws afford it.³³¹

Some surprise may be felt at the proposition that, though international law might stipulate a regime to govern the municipal legal liability of member States for the debts of an international organization, member States are under no obligation to ensure that that regime applies within their national laws. If that were so, then States would be free to adopt within their legal systems regimes inconsistent with that envisaged by international law without thereby committing any international wrong. The absurdity of this is patent. If, to shelter member States from litigious harassment and ensure the orderly administration of its internal financial procedures, either general customary law or the constituent treaty of a particular organization were to provide that the organization is the only source to which its creditors can look for payment, then the member States should be obligated to ensure that their national laws do not make the membership liable to the organization's creditors, since, if they were free to allow such a regime to subsist, then the purposes of the relevant rule of international law or treaty would be frustrated. Conversely, if international law were to stipulate that the member States should be liable to the organization's creditors so that the latter would be guaranteed that, come what may, they would have the means to recover their debts, then, once more, member States should be obligated not to apply any other regime within their national laws, since it would obviously thwart the relevant legal policies if member States were free to enact that the membership should not be liable for the organization's debts.

While recognizing that a wrong would be committed in the former case, Staughton J denied that, in the latter, any wrong would be done by a State whose laws provided a regime diverging from that stipulated by international law.³³² He presumed that, in the second case, States would be free to apply a regime which was more generous to the membership in terms of its liability than that laid down by international law. Yet, assuming Staughton J to have been right in this respect, a State's freedom to choose to protect the members of an organization from liability for its debts would, even then, be partially curtailed by the general rules of customary international law; for, if some creditor were to fail to recover a debt owed by the organization for the reason that the local law shielded its members from

³²⁹ p. 1154f; p. 356a. While sharing this opinion in regard to provisions such as Article II (4) (though, in part at least, for very different reasons: see text at n. 178, above), Kerr LJ, at one point, suggested that, in so far as Article 16 (1) of the ITA imposes on member States an obligation to constitute the ITC as a person within their national legal systems, it also obligates them to confer on it legal personality of the 'nature' stipulated by international law—that is, to apply to the ITC the regime which international law lays down to govern member States' liability in municipal law for the engagements which the ITC makes in the exercise of that personality: p. 1085a; p. 299a–b.

³³⁰ p. 1147f; p. 350c. See text at nn. 311 and 314–17, above.

³³¹ However, presumably Gibson LJ was in agreement with Staughton J in so far as the latter held that, if international law envisages that member States are in fact liable for the debts of an organization, they are nevertheless not obligated to ensure the application of such a regime in their national laws.

³³² See text at n. 325, above.

liability, then the State whose law was involved would arguably be guilty of a denial of justice, at least if the creditor in question were the national of one of the other States members.³³³ However, if the true position under international law were that member States are liable in municipal law to an organization's creditors, then it would probably be the case that States would indeed come under an obligation to ensure that that regime, and no other, prevailed within their national legal systems. As has already been observed, if the reason which moved States to recognize such a regime were the importance of ensuring that justice should be done to an organization's creditors, then that goal could only be reliably secured if member States were duty-bound to ensure that the principle of the liability of the membership prevailed within their national laws. Another possible justification for such a regime, at least in the case of an organization which engages in trading, is that it would facilitate the organization's work by establishing its creditworthiness, since creditors would then be guaranteed the means to recover their debts; and, once more, such a goal as this would only be reliably promoted by the imposition on member States of a duty to ensure that the regime of members' liability was in force under their national laws.

The absence of any obligation on the part of UK to apply whatever regime international law lays down to govern the liabilities of the ITC's member States was not the only reason which Gibson LJ adduced for not looking to international law in order to determine the effect of the 1972 Order in Council. He also held that for the Court to rely on international law to fix the rules of English law governing the liability of the ITC's member States to its creditors would be 'to subject the transactions of the member states as members of the ITC to the judgment of courts of this jurisdiction'.³³⁴ This should not be done 'without the consent of the states concerned';³³⁵ but, in the present case, '[n]othing in [the ITA or the Headquarters Agreement] . . . supports the contention that the member states agreed or intended to subject their transactions as members of the ITC, and any liability under the terms of the international agreement which might result therefrom under international law, to the judgment of the courts of this country'.³³⁶

In this passage, Gibson LJ did what he was purporting to refuse to do—to determine the effect of the 1972 Order by reference to international law. If international law had envisaged that the ITC's member States were to be liable under municipal law to the organization's creditors, then the member States would *ipso facto* have consented to their liabilities being governed by English law and judged by English courts—or would be deemed to have done so.³³⁷ Therefore, if the member States have not consented to this, it must be because neither the ITA nor general international law envisages their liability at municipal law. The present argument thus assumes the conclusion which Gibson LJ went on to reach on the position at international law. Moreover, since he had already rejected the idea that the ITC's mem-

³³³ Cf. last year's volume of this *Year Book*, at p. 404 n. 20; and see n. 116, above.

³³⁴ p. 1147h; p. 350f.

³³⁵ *Loc. cit.* In support of this proposition Gibson LJ cited the decision of the House of Lords in *Buttes Gas and Oil Co. v. Hammer (Nos. 2 and 3)*, *loc. cit.* above (n. 129): pp. 1143h and 1155g–h; pp. 347c–d and 356j–357a. It is doubtful, however, whether their Lordships' decision does in fact support the proposition described in the text.

³³⁶ p. 1148h; p. 350h.

³³⁷ This would be so even assuming international law not to have imposed on the UK an obligation to implement such liability within its national law.

ber States are obligated to incorporate into their law the liability regime stipulated by international law, if Gibson LJ thought that the regime so laid down should be respected by the English courts, then it must have been for some reason other than that the UK would have committed an international wrong if its law were to be inconsistent with it. The explanation clearly lies in notions of the conflict of laws. Gibson LJ thought that the English courts should respect the choice of the member States as to the law which should govern their liabilities, and, since they had chosen that they should not be liable under municipal law to the ITC's creditors, but that their financial responsibilities in regard to the ITC's debts should be governed by international law and by international law alone, the English courts should not disregard that choice and disrupt the operation of the relevant rules of international law by holding the member States liable to the organization's creditors.³³⁸ True, no suggestion appears in his Lordship's judgment that, had he thought international law to stipulate that the member States should be liable to the ITC's creditors, he would have upheld the plaintiffs' cause of action; yet, if the principle which he adopted was that respect is due to the member States' choice of the law which is to govern their liability for the ITC's debts, then it must be presumed that Gibson LJ would have taken this step. Indeed, if Gibson LJ would, nevertheless, have held the defendant States not liable to the plaintiffs by virtue of the general principle of English law that the separate personality of an association shields its members from liability for its debts, then it could hardly have been a reason for his holding the defendant States not liable that this respected the member States' choice of the law to govern their responsibilities for the ITC's debts; for, then, whatever their choice of law, he would inevitably have reached the same conclusion, and the fact that this conclusion respected their choice would have been purely coincidental.

In conclusion, therefore, both of the courts of first instance rejected the plaintiffs' second argument, and it was also rejected, by a majority of two (Kerr and Gibson LJJ) to one (Nourse LJ), by the Court of Appeal. However, amongst the judges who have rejected the argument, there have been considerable divergences in their reasons for so doing; and, while the dissenting opinion of Nourse LJ so far stands alone, there are elements in the approaches of the two other judges in the Court of Appeal, and especially in Kerr LJ's adoption of an approach grounded in the conflict of laws, which must provide the plaintiffs with some hope that their actions might succeed on appeal to the House of Lords.

3. *The ITC as the agent of its member States*

The plaintiffs did not make the success of their present actions turn solely upon the correct analysis of the ITC's status under English law. Even if the ITC possesses an independent legal personality, and even if the nature of this personality is such that its member States are not liable, simply by virtue of their membership of the organization, for the performance of the engagements which it concludes,

³³⁸ Gibson LJ thus shared the concern displayed by Millett J in *In re International Tin Council and Maclaine Watson & Co. Ltd. v. International Tin Council* that the English courts should abstain from assuming the management of the internal affairs of international organizations by subjecting them to parallel regulation by English law: see last year's volume of this *Year Book* at pp. 412-3 and 423; and the judgment of Kerr LJ at p. 1081e-f; p. 296c-d. Gibson LJ's judgment usefully underlines that the member States' choice of the law which is to govern an issue itself determines whether that matter falls within the organization's internal affairs.

nevertheless, the plaintiffs argued, the constitutional structure of the ITC, as laid down in the ITA, is such that, whenever it enters into contracts or loan agreements, the ITC must be considered to be acting as the agent of its member States, which, as principals to those transactions, are liable directly to the organization's co-contractors to pay them the sums owing under those agreements.

This argument of so-called 'constitutional' agency must be carefully distinguished from the allegations of 'factual' agency which appeared in the points of claim of many, but not all, of the plaintiffs.³³⁹ These latter allegations were to the effect that, even if the constitution of the ITC is not so structured that the organization must necessarily operate in a manner which makes it, when it contracts, the agent of its member States, yet the way in which the affairs of the ITC have in fact been managed in practice is such that the organization has acted as their agent, if not generally, then at least on those occasions when it contracted with the present plaintiffs. Rayner did not make a contention of this second type in its original points of claim;³⁴⁰ and, by virtue of the condition on which he had joined their actions to Rayner's,³⁴¹ Staughton J did not allow the allegations of 'factual' agency which were made by the other plaintiffs to be raised before him. Similarly, no argument of 'factual' agency was made by Maclaine Watson before Millett J.³⁴² Since allegations of 'factual' agency, therefore, formed no part of the proceedings which were under appeal, the Court of Appeal did not examine them, either.³⁴³

Millet J did not consider the plaintiffs' third argument for the simple reason that, unlike the other plaintiffs, Maclaine Watson made no contention of this type in its points of claim;³⁴⁴ but all four of the other judges who have so far sat in judgment on the present actions have rejected it.

As has already been seen,³⁴⁵ Staughton J, Kerr LJ and Gibson LJ recognized it to be a well-established principle of English law that 'an unincorporated treaty (i.e. one that has not been enacted into English law by the United Kingdom legislature) is not part of English law', it following from this that such a treaty 'cannot create

³³⁹ For this distinction, see the judgment of Kerr LJ at pp. 1054b-c, 1096h and 1098d; pp. 273e, 308d and 309g.

³⁴⁰ Rayner attempted to amend its points of claim in order to allege 'factual' agency, and Staughton J granted leave for this to be done; but the Court of Appeal ordered that the hearings at first instance should proceed on the basis of Rayner's unamended pleadings. See Kerr LJ at p. 1054c; p. 273f; and Staughton J at p. 698a-d.

³⁴¹ See text at n. 16, above.

³⁴² As in the case of Rayner, no allegation of 'factual' agency appeared in Maclaine Watson's original points of claim, and Millett J refused to allow its pleadings to be amended in order to allow one to be made: p. 715i. Although the Court of Appeal later overturned this ruling (see Kerr LJ at p. 1096f-g; p. 308c), Millett J gave his judgment and made his rulings on the basis of the unamended pleadings.

³⁴³ pp. 1053h and 1096h; pp. 273d and 308e. It may be wondered whether the distinction between arguments of 'constitutional' and 'factual' agency adumbrated in the text is well founded. As Gibson LJ remarked (p. 1155h-1156a; p. 357b), the former argument supposes that the ITC has in practice operated in accordance with the provisions of the ITA. However, this supposition may not necessarily have been correct; for not only was it conceivable that the ITC might have been run in an unconstitutional manner, but the ITA itself might even have been amended by the practice of the organization so as to change its constitutional structure. For the argument of 'constitutional' agency to succeed, it was necessary, therefore, to go beyond the ITA and to adduce evidence regarding the way in which the ITC has in fact been run. The argument of 'constitutional' agency adduced by the plaintiffs thus ultimately collapses into an argument of 'factual' agency.

³⁴⁴ See Kerr LJ at p. 1096d; p. 308a.

³⁴⁵ See text at nn. 23-4 and 256-9, above.

private rights' under English law.³⁴⁶ However, they differed in their understanding of the precise scope of this principle and, consequently, in their appreciation of whether it necessitated rejection of the plaintiffs' argument.

Adopting the formulation advanced by counsel for one of the defendant States,³⁴⁷ Staughton J held the effect of the principle to be that 'you cannot derive private law rights from an unincorporated treaty';³⁴⁸ and he continued:

the test as to whether you are seeking to do so as opposed to simply mentioning the treaty as an incidental fact is whether or not you have to found on the treaty's provisions, express or implied, as an essential element in your cause of action.³⁴⁹

Staughton J held that this was precisely what the plaintiffs needed to do in order to make their contention.³⁵⁰ No statute has been enacted by the UK Parliament creating rules of English law based on the provisions of the ITA. Notwithstanding that the ITA is, consequently, an 'unincorporated treaty', the plaintiffs relied on those of its provisions which govern the constitutional structure of the ITC in order to establish that it acts as the agent of its member States and so create in their favour private rights against those States. The plaintiffs' third argument was thus precluded by the principles of English law relating to the 'non-justiciability' of 'unincorporated' treaties.

Both Gibson and Kerr LJJ disagreed with Staughton J's conclusion in this respect—'though with some doubt' in the case of the latter.³⁵¹ As Gibson LJ recognized,³⁵² neither the conclusion of a treaty by the UK nor the entry into force of a treaty in respect of the UK gives rise, automatically and without more, to the existence of rules of English law with a content based on the provisions of that treaty.³⁵³ It follows from this that a person cannot claim that he enjoys a right under English law if the rule which is alleged to invest him with that right is laid down in a treaty and does not exist as a rule of English law independently of the existence of that treaty.³⁵⁴ In the present case, however, the plaintiffs did not claim that the provisions of the ITA relating to the constitutional order of the ITC had given rise to a new rule of English law which conferred on them some novel cause of action against the defendant States. Rather, to found their cause of action, they invoked existing and familiar rules of English private law: namely, the law of agency. As Gibson LJ remarked, assuming that they were able to prove the existence of a relationship of agency between the ITC and its member States, then:

the plaintiffs would be relying on existing rules of our private law and would not be relying on any provision of [the ITA] as affording them a cause of action not arising under our law,

³⁴⁶ The words are those of Staughton J: p. 702g. See also Kerr LJ at p. 1075g-h; p. 291g; and Gibson LJ at p. 1146e-f; p. 349e-f.

³⁴⁷ p. 703a.

³⁴⁸ p. 701i.

³⁴⁹ Loc. cit.

³⁵⁰ p. 703g.

³⁵¹ p. 1098b; p. 309e.

³⁵² See the passage quoted at n. 258, above.

³⁵³ Subject to at least one possible exception: see n. 275, above.

³⁵⁴ As, for instance, where a statute has been enacted in order to implement the treaty and give effect in English law to the rules which it contains. Although it is sometimes said that, in such a case, it is the treaty which creates the rules of English law in question, the treaty having been 'incorporated' into English law by statute, it is in truth the statute which serves to create those rules, and, in respect to their creation—though not to their interpretation—, the existence of the treaty is, in law, strictly irrelevant.

or as changing the law of this country in any way. Their cause of action would arise from the contract and not from any provision of [the ITA].³⁵⁵

Therefore, while the existence of a relationship of agency is indeed a question 'both of law and fact', the 'law' on which the plaintiffs relied to establish that there is such a relationship between the ITC and its member States, and so to provide the source of their rights against the defendants, was the existing English law of agency.³⁵⁶ Admittedly, in order to prove that there exists between the ITC and its members a state of affairs which the English law of agency considers to constitute a mandate by the latter of the former, the plaintiffs relied exclusively on the ITA.³⁵⁷ However, their purpose for doing so was not to establish that the rules which that treaty lays down have become rules of English law, but, rather, to demonstrate that the manner in which the ITA stipulates that the ITC is to be structured and its internal affairs ordered and arranged is such that the ITC inevitably operates in a fashion which gives rise to certain facts which English law regards as constituting a relationship of agency between the organization and its member States. Albeit somewhat cautiously, Kerr LJ thus held that:

[t]he plaintiffs' submission . . . can perhaps be rationalised with the doctrine of non-justiciability by saying that they only need to refer to [the ITA] to establish the alleged authority of the members as a fact.³⁵⁸

Again, to establish this authority would inevitably involve analysis and interpretation of the ITA in order to ascertain the legal relationships to which that treaty gives rise both between the ITC and its member States and between those member States *inter se*.³⁵⁹ However, to do this would not involve treating the provisions of that treaty as having existence as rules of English law.³⁶⁰ Rather, and as has already been shown, it would simply involve treating the ITA as evidence of the prevalence of certain facts.

The scope which Staughton J gave to the principle that treaties are not part of English law was, therefore, too broad; the test which he employed to determine its infringement failed to differentiate accurately between permissible and impermissible reliance on an 'unincorporated' treaty. As Kerr LJ observed, if Staughton J's approach were taken to its logical extreme, then it would clearly go 'too far to be accepted as a matter of good sense', since 'the plaintiffs would be unable to establish the alleged agency even if [the ITA] had said expressly: "The Council shall

³⁵⁵ p. 1156e-f; p. 357f-g.

³⁵⁶ p. 1146h; p. 349g.

³⁵⁷ As Staughton J pointed out at p. 703g.

³⁵⁸ p. 1098b; p. 309e.

³⁵⁹ *Pace* Kerr LJ, loc. cit.; though see the following note.

³⁶⁰ Nor, it might be added, would it entail the enforcement of the international legal obligations which the member States and the ITC owe to and amongst each other. If it would have done this, then the plaintiffs' contention would have fallen foul of the principle in *Cook v. Sprigg*, [1899] AC 572: namely, that, 'although treaties are agreements intended to be binding on the parties to them, they are not contracts which our courts can enforce' (Kerr LJ at p. 1075h; p. 291h). Kerr LJ's somewhat surprising statement, alluded to in the preceding note, that the plaintiffs' argument did not call for 'analysis and determination of the rights and obligations of the ITC and the members *inter se* resulting from [the ITA]' (p. 1098b; p. 309e) can perhaps be explained as recognition that the plaintiffs' argument did not infringe the principle in *Cook v. Sprigg*. Indeed, earlier in his judgment, he paraphrased that principle in the same terms as he used in this statement: p. 1090f; p. 303e.

enter into all contracts in its own name but as agent for the members jointly and severally”'.³⁶¹ It was thus patent that Staughton J's test of whether an argument 'relies on' the provisions of an 'unincorporated' treaty needed 'further consideration'.³⁶² Undertaking such an appraisal, Gibson LJ recognized it to be necessary to ascertain the precise purpose for which reliance is placed on such a treaty;³⁶³ and, as his judgment makes clear, it is only in so far as such a treaty is relied on to provide a cause of action under, or to create rules of, English law that the principle that treaties are not part of English law precludes an argument which depends on one.³⁶⁴ Since the plaintiffs did not rely on the ITA to such an end, it followed that, in the absence of any other principle precluding reference to that treaty, their third argument was admissible.

The plaintiffs maintained that, under the ITA, it is the Council which is the 'directing mind and will of the ITC'—'[i]t is the ITC', as Counsel for the brokers pithily put it.³⁶⁵ Kerr LJ summarized the plaintiffs' subsequent contentions as follows:

(a) article 4 [of the ITA] provides that 'the Council shall be composed of all the Members', (b) all the members are represented on the council by one delegate, and (c) everything done by the council is therefore effectively done or directly controlled by the members and solely for the members' benefit.³⁶⁶

It was, therefore, quite easy to conceive of the organization as being the agent of its member States; for, not only are they fully apprised of the acts which are done in its name, but it is they who bring them about by their own decision.

Although Staughton J felt there to be 'a good deal to be said for' this argument,³⁶⁷ it was unanimously rejected by the Court of Appeal. In order to determine whether, under English law, the ITC should be deemed to contract as the agent of its member States, both Nourse LJ³⁶⁸ and Gibson LJ³⁶⁹ agreed with Kerr LJ that an analogy should be made between the ITC and an incorporated company.³⁷⁰ In English law, the ITC is a legal person wholly distinct from the legal persons which are its members and which form the association which it represents.³⁷¹ An incorporated company enjoys the same legal nature; and, since there are as yet no rules in the English law of agency specifically relating to international

³⁶¹ pp. 1097h–1098a; p. 309d. See also Gibson LJ at pp. 1155h–1156a; p. 357b–c.

³⁶² Gibson LJ at p. 1146f; p. 349f.

³⁶³ p. 1146h; p. 349g and h.

³⁶⁴ This it does for the simple reason that such an argument assumes that treaties can do what that principle establishes that they cannot—namely, bring about the creation of rules of English law. Gibson LJ thought that the plaintiffs' second contention was precluded by this principle, at least to the extent that it depended on arguments concerning the position at international law under the ITA: see text at nn. 298–300, above.

³⁶⁵ Quoted by Staughton J at pp. 698i–699a.

³⁶⁶ p. 1098f; p. 309j.

³⁶⁷ p. 699g. Millett J, in his judgment in *Maclaine Watson & Co. Ltd. v. International Tin Council*, remarked that 'it might readily be allowed that there is an arguable case' in favour of the plaintiffs' third argument: see last year's volume of this *Year Book* at p. 422 n. 93.

³⁶⁸ pp. 1129h–1130a; p. 335h.

³⁶⁹ p. 1157a–b; p. 358a. See also p. 1157e–f; p. 358d–e.

³⁷⁰ See, especially, the passage from Kerr LJ's judgment quoted at n. 384, below. See also Kerr LJ at p. 1096c; p. 307j.

³⁷¹ p. 1098g; p. 309j.

organizations, the existing rules relating to incorporated companies should be applied to them.³⁷² As Kerr LJ observed, contracts entered into by the ITC 'are therefore *prima facie* made on its own behalf alone, without engaging the liability of the members, in the same way as contracts made by a company subject to the Companies Acts'.³⁷³ Moreover, if they were to succeed in rebutting that presumption, Kerr LJ pointed out³⁷⁴ that the plaintiffs had to overcome the 'fundamental jurisprudence' of the House of Lords in *Salomon v. A. Salomon & Co. Ltd.*³⁷⁵—a case which established 'the foundation of our modern company law'.³⁷⁶ Their Lordships there rejected the very contention advanced by the plaintiffs in the instant case: namely, that 'agency between a corporation and its members in relation to the corporation's contracts can be inferred from the control exercisable by the members over the corporation or from the fact that the sole objective of the corporation's contracts was to benefit the members'.³⁷⁷

The plaintiffs tried to distinguish the decision in *Salomon v. A. Salomon & Co. Ltd.* on two grounds. First, they argued that, although the House of Lords there held the control exercised over the affairs of a body corporate by its members—its shareholders—to be insufficient to establish a relationship of agency between the two, the control which the member States wield over the actions of the ITC is far more extensive. While the shareholders of an incorporated company enjoy some control over its affairs at the company's general meeting, the directing 'mind' and 'will' of the company is in truth its board of directors; and, when they reach decisions on what the company should do, the directors do not do so as mere delegates of the shareholders, simply communicating the views and opinions of the latter and advancing what the latter have declared their interests to be, but they exercise their own judgment as to what they themselves consider best for the company and for its shareholders. It is, therefore, difficult to see in the body corporate an agent for its shareholders. In contrast, it is much easier to suppose a relationship

³⁷² The ITC is not a 'body corporate' in English law, nor is it deemed to be one: see text at nn. 132–3, above. The rules of English law which apply to bodies corporate are, therefore, not applicable as such to the ITC: see especially *Maclaine Watson & Co. Ltd. v. International Tin Council (No. 2)*, noted in last year's volume of this *Year Book* at pp. 425–6 nn. 108–11 and pp. 426–7 nn. 114–16. The practical and legal importance of this point was emphasized by the Court of Appeal: see text at nn. 134–6, above. Consequently, care must be exercised in drawing analogies between the ITC and a 'body corporate' if the aim is to subject the former to rules of English law which are properly applicable to the latter. It may be wondered whether such care was exercised by the Court of Appeal in the present context, however. The analogy which the Court drew resulted in the application to the ITC of the decision of the House of Lords in the case of *Salomon v. A. Salomon & Co. Ltd.*: see text following this note. Yet that decision must be appreciated in the light of the fundamental principle of English company law that shareholders are not liable without more for the obligations which a company assumes in its own name—a principle which is justified by the fact that it protects venture capital and so encourages investment. This aim would obviously be thwarted if the very relationship between shareholder and company were to be considered as making the former liable under the law of agency for the latter's undertakings. However, the objective of promoting investment and encouraging venture capital is hardly appropriate to the case of the ITC. Rather than applying by analogy the decision in *Salomon v. A. Salomon & Co. Ltd.*, the Court should, therefore, have applied the basic principles of the law of agency, taking account both of the demands of justice and of those factors which justify the rule that the members of the ITC are not liable, simply by virtue of their membership, for the organization's debts.

³⁷³ p. 1098g; pp. 309j–310a.

³⁷⁴ p. 1098h; p. 310a.

³⁷⁵ [1897] AC 22.

³⁷⁶ p. 1099a; p. 310b.

³⁷⁷ Kerr LJ at pp. 1098h–1099a; p. 310a–b.

of agency between the ITC and its member States, the plaintiffs argued, since the former acts directly on the latter's instructions.³⁷⁸ The Court of Appeal, however, held that the greater degree of control wielded over the ITC by its members did not merit refraining from applying to the instant case the decision of the House of Lords. Pointing out that their Lordships did not deem it relevant that the company there in question possessed a board of directors, Kerr LJ affirmed there to be no difference in principle between a corporation which acts on the direct instructions of its shareholders and one whose affairs are managed by a board of directors, the shareholders exercising control solely through the indirect means of the company's general meeting.³⁷⁹ Moreover, he remarked that the plaintiffs exaggerated the degree of control which the member States enjoy over the ITC's operations, pointing out that 'the everyday management of the ITC's activities and contracts was not controlled by the delegates of the members, meeting in council sessions from time to time, but by the executive chairman and buffer stock manager'.³⁸⁰

Kerr LJ also rejected the second ground on which the plaintiffs sought to distinguish the decision in *Salomon v. A. Salomon & Co. Ltd.* Although the House of Lords there held that the benefit which shareholders derive from the activities of a body corporate does not justify considering it their agent, the plaintiffs argued there to be a much more intimate tie between the activities of the ITC and the interests of its member States than prevails in the case of a company and its shareholders. The duty imposed on the directors of an incorporated company to advance the interests of its shareholders is broad and diffuse in nature, and it is not necessary that all of the company's actions should redound to their benefit. In contrast, the objects which the ITC is to pursue under Article 1 of the ITA are, each and every one, the objects of its member States. Moreover, by means of the control which they exercise in the Council, the member States are in a position to ensure that even the day-to-day operations of the ITC are conducive to their interests and secure their benefit. Nevertheless, as Kerr LJ pointed out, 'the fact that the business objectives of the body corporate were those of its members was precisely the point which was held in *Salomon v. A. Salomon & Co. Ltd.* to make no difference'.³⁸¹ He further noted that, while the ITC is limited to the pursuit of the objectives which its members have set for it in the ITA, it would be wrong to suppose that the member States share the same interests and pursue the same ends. Rather, the membership of the ITC is divided into two groups, producers and consumers, whose interests are opposed and whose purposes conflict, and it is the function of the Council to hold the balance between them. It cannot, therefore, be assumed that the ITC always operates in such a way as to benefit every one of its members.

³⁷⁸ Nourse LJ attached importance to this point in upholding the plaintiffs' second argument: see text at nn. 227-9, above.

³⁷⁹ p. 1099c-d; p. 310d-e.

³⁸⁰ p. 1099e and g; p. 310f and h. Contrast the opinion of Nourse LJ in this respect: see text at n. 228, above. For the control which the buffer stock manager exercises over the day-to-day running of the buffer stock, see Article 28 of the ITA.

Gibson LJ rejected the plaintiffs' argument for the additional reason that the Council reaches its decisions by majority voting. He thought it difficult to consider the member States as having agreed that, whenever the ITC engages in some transaction, it should be deemed to do so as their agent, given that, at any time, they might find themselves in a minority in the Council and the organization might, consequently, engage in some transaction contrary to their wishes: p. 1157c; p. 358c.

³⁸¹ p. 1099d; p. 310e.

It is accordingly hard to suppose that the ITC is the agent of each of its member States whenever it contracts.³⁸²

The Court of Appeal, therefore,³⁸³ rejected the plaintiffs' third argument on its merits, Kerr LJ concluding that:

the relationship between the member States and the ITC under the provisions of the [ITA] is not that of principals and agent but in the nature of a contract of association or membership similar to that which arises on the formation of a company between the shareholders inter se and the legal entity which they have created by their contract of association. The correct analysis of the [ITA] is in line with the decision of the House of Lords in *Salomon v. A. Salomon & Co. Ltd.* . . . and not with any contract of agency between the members as principals and the council as the members' agent.³⁸⁴

In respect of the claims of the brokers, both Staughton J and Kerr LJ held that the plaintiffs' third argument must fail for a further, additional, reason. Neither the loan agreements made by the banks nor the contracts for the sale of tin concluded by the brokers stipulate that the ITC entered those transactions as the agent of its member States. This does not in itself preclude considering the ITC to have made those engagements as the agent of its member States. However, even if they were to have expressly authorized the ITC to act as their agent when dealing with the plaintiffs, the member States could not be deemed the organization's principals if the terms of the relevant contracts were such as to exclude the notion that it entered into those transactions as anybody's agent.³⁸⁵ Staughton J and Kerr LJ held the contracts which the ITC concluded with the plaintiff brokers to do precisely this.³⁸⁶

³⁸² p. 1099e-f and g; p. 310g and h.

³⁸³ Kerr LJ also considered the plaintiffs' argument to be disproved by the fact that neither the Council of the ITC nor any of the officers of the organization have the authority to pledge the credit of the member States, as is made clear by Article 21 of the ITA: p. 1099f-g; p. 310g-h. Since that provision stipulates that security for the ITC's borrowing may be afforded by guarantees or undertakings to be provided by the member States, it clearly assumes that the organization and its officers cannot, of their own initiative, simply pledge the members' credit to a lender. This is made doubly clear by Article 2, which provides that the guarantees and undertakings referred to in Article 21 are to be given by the member States to the ITC itself, and not to the organization's creditors.

³⁸⁴ p. 1100c; p. 311b. See also Gibson LJ at p. 1157e-f; p. 358d-e.

³⁸⁵ *Bowstead on Agency* (15th. edn., 1985), p. 321.

³⁸⁶ The contracts which the brokers concluded with the ITC were written on a standard form which the London Metal Exchange (LME) required its members to use when trading with the organization. Kerr LJ pointed to three features of those contracts which he thought incompatible with the ITC being party to the legal relationships which they create as agent for some undisclosed principal, which was also party to those same relationships. First, each of the contracts provides that it 'is made between ourselves and yourselves as principals, we alone being liable to you for its performance'. Kerr LJ accepted Staughton J's opinion that the phrase 'as principals' is used in apposition to both 'ourselves'—the broker—and 'yourselves'—the ITC. Staughton J added that this construction was not negated by the phrase 'we alone being liable to you for its performance'. These words were inserted, he thought, to make doubly clear the absence behind the broker of any undisclosed principal, it being necessary to negative the inference which might be drawn from the fact that members of the LME are often termed 'brokers' that they conduct business as agents: p. 700b-f. Kerr LJ also rejected the argument that, although the clause beginning 'we alone . . .' excludes agency in the case of the broker, such a possibility is not excluded in respect of the customer, since the ITC might properly be described as a 'principal' even if it were acting on behalf of some undisclosed principal. Businessmen, he thought, would have thought the simple phrase 'as principals' sufficient to exclude the possibility that either party contracted as an agent: p. 1101b-d; pp. 311j-312a. The second element in the contracts which was inconsistent with the ITC's agency was the dispute-settlement clauses which they each contain. These provide that questions arising from the contract are to be notified to the executive secretary of the LME

4. *The immunities of the foreign member States and the EEC*

Each of the three courts which have so far sat in judgment on the present actions have, therefore, rejected the plaintiffs' contention that the contracts and the loan agreements which they concluded with persons acting in the name of the ITC created direct legal relations between themselves on the one hand and the States members of that organization on the other. However, even if the courts had recognized that they indeed enjoyed a cause of action under their contracts against the member States, the plaintiffs would still have had to overcome certain juridical obstacles before they would have been able to recover from at least certain of the defendants the sums which are owing to them. The foreign States defendants maintained that, whichever of the plaintiffs' three arguments might prevail, they nevertheless enjoyed immunity from suit by virtue of the State Immunity Act 1978. Moreover, the EEC claimed that no suit could be brought against it without its consent by virtue of the immunity which it alleged that it enjoys under English common law. Whatever the merits of these arguments, the UK, on the other hand, clearly was not entitled to any such immunity from suit before its own courts. The prospect was, therefore, raised that, if any of the plaintiffs' three arguments were accepted, the UK might find itself answerable alone to the ITC's creditors for the organization's entire debt.

Among the present plaintiffs, Maclaine Watson proceeded solely against the UK. Consequently, no arguments for immunity from suit were raised before Millett J. Although the other plaintiffs proceeded against the entire membership of the ITC, neither Staughton J nor the Court of Appeal found it necessary to address the claims of immunity to which those suits gave rise, rejecting, as they did, the existence of any cause of action. Both of them, nevertheless, made certain important observations which are worthy of note regarding the immunities to which the foreign member States and the EEC laid claim.

Three issues arose concerning the claims to immunity made by the foreign States members of the ITC.³⁸⁷ The first related to the location of the burden of proof. When an action is brought against a foreign State and the question arises whether that State is immune from being so impleaded under the State Immunity Act 1978, does it fall to the defendant State to prove that it is entitled to immunity in respect of the instant proceedings, or is it rather the plaintiff's responsibility to show that the impleaded State does not enjoy immunity from its suit? Staughton J held the burden to fall on the plaintiff, giving three reasons in support of his conclusion.³⁸⁸ First, Section 1 (1) of the State Immunity Act lays down the general rule that

committee 'by either of the parties or both of them jointly'. This clearly supposed there to be just two parties to the contract, Kerr LJ remarked: p. 1101f-g; p. 312c-d. Thirdly, several provisions of the contract confer on the broker for its protection certain rights against the customer. The broker could know that these rights provided it with adequate security only if it were able to come to an appreciation of the position of its customer. While the broker might be able to do this in respect of the ITC itself while negotiating the contract, it could hardly learn anything about some principal whose identity was not disclosed. Kerr LJ thus held that '[n]one of these provisions make commercial sense unless they are seen as addressed by the broker to the named customer with whom he contracts and not also to some unknown possible other parties of whom he knows nothing': p. 1101d-f; p. 312b-c.

³⁸⁷ Gibson LJ also made the comment, which is worthy of note, that, while a foreign State cannot 'be placed under any sanction' for failing to comply with a direction of the court for discovery of documents (see Section 13(1) of the State Immunity Act), nevertheless, in deciding any issues of fact which might arise, 'the court could have due regard to any failure to disclose relevant documents': p. 1158c-d; pp. 358j-359a.

³⁸⁸ p. 676a-b.

foreign States are immune from suit except in the circumstances described in the following sections of the Act. The presumption is thus that the defendant State is immune, and it should fall to the plaintiff to rebut that presumption. Secondly, under Section 1 (2), a court is required, of its own motion, to give effect to the immunity to which a State is entitled under the Act if that State does not enter an appearance in the proceedings. Staughton J thought this to be scarcely compatible with the notion that, if it does choose to appear, the defendant State must shoulder the burden of proving that it should be granted immunity from the plaintiff's suit. Thirdly, under Section 12, service of the plaintiff's writ must be effected through the intermediary of the Foreign and Commonwealth Office, the latter transmitting the relevant documents to the defendant State's Ministry of Foreign Affairs. Since service must, therefore, take place outside the jurisdiction, it is governed by Order 11 of the Rules of the Supreme Court.³⁸⁹ It follows that the plaintiff, if it is ever to be able to initiate its action, must first be able to show that it has a good arguable case against the foreign State against which it wishes to proceed.

Although Staughton J's conclusion on this point does not accord with the opinion of certain commentators,³⁹⁰ it appears to have gone unchallenged before the Court of Appeal.³⁹¹

The second issue concerned the procedure which should apply when the question arises whether the defendant State is immune from the plaintiff's suit by virtue of the 1978 Act. For the court to proceed to consider the merits of the claim, must the plaintiff simply show a good arguable case that the defendant State is not entitled to immunity, the question of whether it is in fact entitled to immunity being decided later, at the same stage as the examination of the merits, or should the question of the defendant State's entitlement to immunity be treated rather as a preliminary issue, the plaintiff having to prove, and the court to decide, that it is not so entitled before passing on to the merits? Staughton J's sympathies lay with the former alternative. As has already been seen, in order to justify service on the defendant State in accordance with the procedure stipulated in Section 12 of the 1978 Act, the plaintiff would already have to be able to show a good arguable case that the defendant State was not entitled to immunity in respect of its claim. Staughton J thought that it would represent 'a strange refinement of the law' and be somewhat cumbersome if discharge of this burden were to take the plaintiff no further than a hearing on the formal preliminary issue of whether the defendant State is entitled to immunity, the court only being able to proceed to consider the merits once it had adjudicated on this.³⁹²

Although attracted by this argument,³⁹³ Kerr LJ held that the question whether the defendant State is entitled to immunity 'must be decided as a preliminary issue in favour of the plaintiff, in whatever form and by whatever procedure the court may consider appropriate, before the substantive action can proceed'³⁹⁴—a conclu-

³⁸⁹ Thus, in the present case, the foreign defendant States had been served abroad pursuant to Order 11: Kerr LJ at p. 1106h; p. 316e.

³⁹⁰ See, e.g., Mann, *this Year Book*, 52 (1981), p. 43 at p. 62.

³⁹¹ Although he did not deal with the issue, Gibson LJ assumed the plaintiff to bear the responsibility of proving that the defendant State is not entitled to immunity in respect of its suit: p. 1157h; p. 358g.

³⁹² p. 678h.

³⁹³ p. 1103h; p. 314a-b.

³⁹⁴ p. 1104e; p. 314f-g.

sion with which Gibson LJ agreed.³⁹⁵ Kerr LJ pointed out that, if the showing of simply a good arguable case that the defendant State is not entitled to immunity were to lead to a trial of the merits, the defendant State would then find itself in an extremely awkward situation. Since its entitlement to immunity would not as yet have been finally decided against it, the plaintiff having merely shown the existence of a good arguable case for it not to be so entitled, the defendant State might still wish to rely on its plea of State immunity in order to defeat the plaintiff's claim. At the same time, it might also wish to contest the existence of any liability on its part to the plaintiff. However, the defendant State could not do such a thing without losing any right which it might have under the 1978 Act to immunity in respect of the instant proceedings; for to defend the substantive claim against it would amount to taking a step in the proceedings, causing the defendant State to be deemed to have submitted to the adjudicatory jurisdiction of the court by virtue of Section 2 (3) (b) of the Act. Consequently, if Staughton J were right, the defendant State would be compelled to leave the substantive claim against it undefended if it wished to maintain its right to State immunity. Not only would it be unjust to place a State in such a situation, but it would also serve to undermine its very right to immunity.³⁹⁶ Kerr LJ also noted that if, in view of these considerations, entitlement to immunity under the 1978 Act were treated as a formal preliminary issue, it would put the procedure which governs claims to immunity under that Act in line with that which applies to claims to State immunity under the common law.³⁹⁷

For his part, Gibson LJ relied on the wording of the sections of the 1978 Act which create the exceptions to the immunity which foreign States otherwise enjoy under Section 1 of the statute. Taking Section 3 as an example, he noted that it deprives a defendant State of immunity in respect of proceedings relating to “(a) a commercial transaction *entered into* by the State; or (b) an obligation of the State which by virtue of a contract . . . *falls to be performed* . . .” It does not say “allegedly entered into” or “which by virtue of a contract is alleged to fall to be performed.”³⁹⁸ A court is only entitled to exercise jurisdiction in proceedings in which a foreign State is impleaded by sitting in judgment on the claim against it if one of these exceptions applies; and, since the criteria of their application presuppose the existence of certain propositions of law and fact, rather than merely a good arguable case that they exist, a court cannot proceed to a hearing of the substantive issues raised by a claim against a State until those propositions of fact and law have been proved and the exception thus been shown to apply.³⁹⁹

Kerr LJ observed that, in the instant proceedings, the question under discussion

³⁹⁵ pp. 1157h and 1158b; p. 358g and h. Gibson LJ added that, if the defendant State's entitlement to immunity were found to turn on issues of fact, then ‘the court could give directions for the trial of those issues, including directions for discovery, the calling of witnesses, and for cross-examination of witnesses on affidavits’: p. 1158c; p. 358j.

³⁹⁶ p. 1104c-d; p. 314e-f.

³⁹⁷ p. 1104c; p. 314e. See the decision of Goff J at first instance in *I Congreso del Partido*, [1978] QB 500 at pp. 535-7, [1978] 1 All ER 1169 at pp. 1198-200.

³⁹⁸ pp. 1157h-1158a; p. 358h (emphasis in the original).

³⁹⁹ Indeed, if Section 3(1)(a) of the 1978 Act were to be read so as to apply when a commercial transaction had allegedly been entered into by a State, then the exception to immunity which that provision creates would apply and a defendant State would enjoy no immunity in respect of the instant proceedings once a good arguable case had been shown that it had entered into such a transaction. State immunity would then be seriously undermined, defendant States being immune under the 1978 Act only when there was no good arguable case that they were not.

was 'largely academic and a matter of form rather than substance'.⁴⁰⁰ This will indeed often be so. When the sole question in dispute between the plaintiff and the defendant State is whether the latter is entitled to immunity from the former's suit, there is little appreciable difference between the two alternative procedures described. Under either of them, the court would simply determine whether or not the defendant State was entitled to immunity, and, if it was not, proceed to give judgment for the plaintiff, the sole difference being that, under one of them, the court would first take the formal step of seeing whether or not there was a good arguable case that the defendant State was not immune. Thus, in the instant case, if the foreign defendant States were not immune, the court could simply proceed to give judgment for the plaintiffs.⁴⁰¹ In contrast, if the plaintiff's claim depends 'on any facts or contractual claims or defences on the merits', then substantial differences between the two procedures do appear.⁴⁰² Under the procedure favoured by Kerr and Gibson LJ, arguments on the merits of the claim could not be made or be heard until the defendant State had been found not to be immune from the plaintiff's suit, whereas, under the procedure preferred by Staughton J, argument on such issues would be heard together with arguments relating to State immunity provided the plaintiff had first shown a good arguable case that the defendant State was not immune. In the latter case, the defendant State would thus find itself a party to proceedings in which the merits of certain claims from which it might well be immune were being outlined and discussed—whether certain acts were in fact done, whether they amounted to a breach of obligation, whether some defence to the plaintiff's claim exists, and what is the proper measure and amount of damages. The defendant State would thereby be subjected to the adjudicatory process of the court, irrespective of its possible right that this not occur without its consent and regardless of the fact that it might even constitute a breach of international law.

It is hard to resist the impression that something like this occurred in the instant case. The defendant States have participated in long and complex proceedings centring chiefly on the plaintiffs' allegations that they are vested with rights to require the defendants to pay to them the sums which they are owed under their contracts and loan agreements with the ITC. Rationally speaking, the question whether the plaintiffs in fact do enjoy such rights against the defendant States is preliminary to the problem of whether the defendant States are nevertheless immune from any suit which is founded on those rights. The Court of Appeal clearly considered this to be the case, addressing the former problem before the latter, and both Kerr and Gibson LJ considering the latter question to be, strictly speaking, redundant in view of their answer to the former. However, if immunity from the adjudicatory jurisdiction of the court means anything, it surely requires that the defendant States should not have been subjected to such long and arduous proceedings without it first being determined whether there was any point in pursuing them. Therefore, before embarking on an examination of whether the plaintiffs do in fact enjoy the rights against the defendants to which they lay claim, the Court should first have ascertained whether, assuming those rights to exist, the

⁴⁰⁰ p. 1103e; p. 313h.

⁴⁰¹ Though see text at nn. 248–52, above.

⁴⁰² Kerr LJ at p. 1103e–g; pp. 313h–314a.

defendant States are nevertheless entitled to immunity in respect of the claims which the plaintiffs have founded on them.⁴⁰³

The third issue which arose concerning State immunity was whether the foreign defendant States would in fact have been entitled to immunity in respect of the plaintiffs' claims, had the plaintiffs succeeded in establishing their causes of action against the member States of the ITC.

The foreign States defendants conceded that, had the plaintiffs' first argument prevailed, then they would not have been entitled to immunity in respect of the present actions. The contracts for the sale of tin and the loan agreements would then have been deemed to have been concluded between the plaintiffs on the one side and the member States of the ITC on the other, there being no separate legal person constituting the ITC for the plaintiffs to contract with. That being so, the plaintiffs' actions against the defendant States to recover the sums which they are owed under those agreements would clearly have been 'proceedings relating to . . . commercial transaction[s] entered into by the State[s]' impleaded, under Section 3 (1) (a) of the State Immunity Act.⁴⁰⁴

Moreover, the Court of Appeal unanimously held that, if the member States' liability had been established on the grounds invoked by the plaintiffs in their second argument, then the foreign defendant States would not have been entitled to immunity in respect of the plaintiffs' actions. The foreign States urged that the exception to immunity provided in Section 3 (1) (a) of the 1978 Act would not have applied in such a case. Although the member States would then have been directly liable to the plaintiffs for the performance of the obligations stipulated in the contracts which the plaintiffs had concluded with the ITC, it could hardly be said that those agreements would have represented 'commercial transaction[s] entered into by the [member] State[s]'. Rather, it would have been the ITC and the ITC alone which had 'entered into' those transactions. Nourse LJ accepted this argument.⁴⁰⁵ Kerr LJ, however, did not find it necessary to consider it;⁴⁰⁶ for, whatever its merits might be, he held that the foreign defendant States would have been deprived of their immunity by Section 3 (1) (b)—an opinion with which both Nourse⁴⁰⁷ and Gibson⁴⁰⁸ LJ concurred. That paragraph provides that:

A state is not immune as respects proceedings relating to— . . . an obligation of the State which by virtue of a contract . . . falls to be performed . . . in the United Kingdom.

For this paragraph to apply, it is necessary for the proceedings to relate to an obligation of the State impleaded, that obligation must fall to be performed in the UK, and it must fall to be performed there 'by virtue of' some contract. However, Kerr LJ held that, unlike the 'transaction' to which paragraph (a) refers, it is not

⁴⁰³ Staughton J showed some awareness of this point at first instance, at least in so far as he formally placed the issue of the foreign defendant States' immunity prior to that of the existence of the plaintiffs' cause of action: p. 672h. However, he considered that, in substance, the latter issue was preliminary to the former: p. 673a. Consequently, he disposed of the case on the grounds that the plaintiffs enjoyed no cause of action against the members of the ITC and ignored the question of whether the foreign defendant States would have been entitled to immunity if the plaintiffs had succeeded in proving their cause of action (though see text at n. 412, below).

⁴⁰⁴ See Kerr LJ at p. 1104f; p. 314h.

⁴⁰⁵ p. 1130d; p. 336b.

⁴⁰⁶ p. 1104h; p. 315a.

⁴⁰⁷ p. 1130d; p. 336b.

⁴⁰⁸ p. 1157h; p. 358g.

necessary that that contract should have been 'entered into by the State' impleaded, 'no equivalent' to that phrase appearing in paragraph (b).⁴⁰⁹ Nourse LJ similarly held that, on the 'plain and ordinary meaning of [its] words', Section 3 (1) (b) is capable of applying 'whether the state [impleaded] is a party to the contract or not'.⁴¹⁰ If the plaintiffs' second argument had prevailed, the conditions laid down by Section 3 (1) (b) would, therefore, have been satisfied: the proceedings would have related to obligations of the defendant States, those obligations would have fallen to be performed in the UK, and they would have done so by virtue of the very contracts which gave rise to their existence—namely, the contracts and loan agreements which the plaintiffs had concluded with the ITC.

Although Nourse LJ expressed no opinion on the matter, both Kerr and Gibson LJ held that, for the same reasons, the foreign defendant States would not have been entitled to immunity if the plaintiffs had succeeded in their third argument. Again, it might possibly be said that the member States, as undisclosed principals, would not have 'entered into' the contracts which the ITC concluded as their agent. Section 3 (1) (a) would then not have deprived the foreign States defendants of their immunity under Section 1 of the 1978 Act. Nevertheless, no such requirement exists under Section 3 (1) (b); and, the conditions of that paragraph being fulfilled, the foreign defendant States would consequently not have been entitled to immunity in respect of the plaintiffs' suit.⁴¹¹ While he did not explain his reasons, Staughton J also indicated his opinion that Section 3 would have been applicable in such circumstances.⁴¹²

Therefore, had the plaintiffs successfully established their causes of action against the members of the ITC, the foreign States members would not have been entitled to immunity in respect of the present proceedings, whichever of the plaintiffs' three arguments might have prevailed.

The foreign States members of the ITC were not the only ones among the defendants to claim immunity to the plaintiffs' suits. A separate claim of entitlement to immunity was also raised by counsel for the EEC.⁴¹³ The EEC conceded that, not being a State, it did not qualify for immunity under the State Immunity Act.⁴¹⁴ It also conceded that, whatever its entitlement to immunity might be, it

⁴⁰⁹ pp. 1104h–1105a; p. 315a.

⁴¹⁰ p. 1130d–f; p. 336c–d.

⁴¹¹ See Kerr LJ at p. 1105a; p. 315a; and Gibson LJ at p. 1157h; p. 358g.

⁴¹² p. 701d–e. Indeed, Staughton J hinted that, even if the member States of the ITC, as undisclosed principals, would not have been parties to the contracts which the organization concluded with the plaintiffs, paragraph (a), as well as paragraph (b), of Section 3(1) would have deprived the foreign States defendants of their immunity. Thus he remarked that, even then, there would have been a 'transaction' in the meaning of Section 3; and, since subsection (1)(a) is the only provision in Section 3 which creates an exception to immunity in respect of 'transactions', this would appear to be a reference to that provision. If this was Staughton J's opinion, then it might be justified by reference to Section 3(3), which defines the phrase 'commercial transaction' for the purposes of Section 3. Paragraph (c) of this subsection provides that these words mean, *inter alia*, a 'transaction . . . in which a State engages . . .'. To contract as an undisclosed principal is to 'engage in' the transaction which is concluded by the agent; and, although Section 3(3) does not purport to define the phrase 'entered into' for the purposes of Section 3(1)(a), surely those words must be read in the light of the paraphrase which is given to them in paragraph (c).

⁴¹³ Kerr LJ entertained some doubt whether this claim was in fact made with the approval of the EEC: p. 1112b; p. 320h–j.

⁴¹⁴ See Kerr LJ at p. 1107e; p. 316h. For the definition of 'State' under the 1978 Act, see Sections 14(1)(5) and 21(a).

could not be in a better position than that enjoyed by the foreign States defendants under that Act.⁴¹⁵ Since the Court of Appeal considered that, if the plaintiffs had established their causes of action against the ITC's members, those States would not have been entitled to immunity in respect of the present proceedings, the EEC would, therefore, by its own admission, not have been immune either. It was, therefore, unnecessary to consider the EEC's claim. However, as Kerr LJ remarked, 'it would of course be a matter of considerable importance if the EEC were immune from the jurisdiction of the courts of its member states'.⁴¹⁶ That being so, and having heard much argument on the question, the Court of Appeal decided to express an opinion on the EEC's claim. This they unanimously thought to be 'entirely misconceived', 'ill-judged' and 'untenable'.⁴¹⁷

Kerr LJ, with whose judgment on this question Nourse LJ concurred,⁴¹⁸ held that the EEC is not entitled by statute to 'any jurisdictional immunity whatever' before the UK's courts.⁴¹⁹ The European Communities Act 1972 gives effect in English law to the rules laid down in the Treaty of Rome, the Merger Treaty and the Protocol on the Privileges and Immunities of the European Communities annexed to the Merger Treaty. However, Kerr LJ could find nothing in those treaties to suggest that the EEC itself is to enjoy immunity from legal process before the national courts of its member States. Indeed, their provisions pointed 'in precisely the opposite direction'.⁴²⁰ Kerr LJ placed especial reliance on Article 183 of the Treaty of Rome, which provides:

Save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

This article, he thought, 'virtually says that the EEC shall have no immunity in the courts of the member states',⁴²¹ in as much as it makes clear that the mere fact that the EEC is impleaded does not deprive those courts of jurisdiction in the relevant proceedings—something which would occur if the EEC were entitled to any jurisdictional immunities. However, Kerr LJ held that 'it may go too far to treat [Article 183] as conclusive as though it contained an exhaustive and unequivocal submission to the courts of the member states in all such cases'.⁴²² Nevertheless, 'any remaining doubt' he thought to be removed by the Merger Treaty, Article 28 of which specifically regulates the privileges and immunities to be enjoyed by the EEC under the national laws of its member States.⁴²³ This article binds member States to grant the EEC the privileges and immunities which are listed in the

⁴¹⁵ See Kerr LJ at p. 1107c; p. 316h.

⁴¹⁶ p. 1107e; pp. 316j–317a.

⁴¹⁷ Kerr LJ at pp. 1107e and 1112b; pp. 317a and 320h–j. Although the EEC's claim to immunity was raised at first instance, Staughton J did not express an opinion on it: p. 673b.

⁴¹⁸ p. 1131a; p. 336g.

⁴¹⁹ The phrase 'any jurisdictional immunity whatever' (p. 1111c; p. 320b), like the phrase 'any legal process' (p. 1111d; p. 320c), apparently embraces immunity from both adjudicatory and enforcement jurisdiction.

⁴²⁰ p. 1109g; p. 318j.

⁴²¹ p. 1110h; p. 319j. He acknowledged, however, that this first clause of this article removes from their jurisdiction claims against the EEC to make good damage arising from its 'non-contractual liability'. See the second paragraph of Article 215 of the Treaty of Rome.

⁴²² Loc. cit.

⁴²³ p. 1110h; p. 319j.

Protocol annexed to the Merger Treaty.⁴²⁴ Yet, as Kerr LJ noted, the Protocol confers on the EEC solely such privileges as the inviolability of its premises and its archives, together with exemptions from taxes and customs duties, and there 'is no suggestion' that it should enjoy any jurisdictional immunities before national courts.⁴²⁵ Therefore, the 1972 European Communities Act, in so far as it incorporates into UK law the various treaties relating to the EEC, does not confer on the EEC any immunities of the kind claimed, Kerr LJ held; and he added, '[f]or the sake of completeness', that 'there is equally nothing in the United Kingdom legislation which could possibly confer any immunity on the EEC beyond what is in the treaties'.⁴²⁶ Gibson LJ expressed a similar conclusion.⁴²⁷

If the EEC's claim was to succeed, it therefore had to be established that the organization is entitled to immunity at common law. The EEC maintained that, since it possesses powers and functions analogous to those of sovereign States,⁴²⁸ it should be deemed 'entitled to sovereign immunity analogous to that of foreign states under the principles of the common law'.⁴²⁹ The EEC thus did not rely on the claim that there exists a rule of customary international law entitling international organizations to jurisdictional immunities before the national courts of their member States. Rather, its contention was simply that, since the EEC enjoys many of the attributes of a State, the existing rules of English law relating to State immunity should be applied to it by analogy. Its argument was thus based solely on existing rules of English law, applying classic methods of English legal reasoning to their interpretation. Moreover, it was confined to the specific case of the EEC itself, and did not purport to have any relevance or application to the case of other international organizations.

Notwithstanding the limited form which the EEC's argument thus took, the Court of Appeal dealt with its claim to immunity on a much broader basis. Rather than consider the merits of the analogy urged on it by the EEC,⁴³⁰ the Court looked instead to see whether there is any rule of customary international law which obligates States to accord that organization jurisdictional immunity before their national courts. Kerr LJ thus held that the EEC could only be entitled to immunity before the UK's courts if there was 'some degree of international recognition of the immunity claimed';⁴³¹ and he continued:

⁴²⁴ The relevant part of Article 28 is quoted by Kerr LJ at p. 1111b; p. 320a.

⁴²⁵ p. 1111e; p. 320b.

⁴²⁶ p. 1111f; p. 320e.

⁴²⁷ p. 1158f; p. 359e.

⁴²⁸ See Kerr LJ at pp. 1107h-1108a; p. 317e.

⁴²⁹ p. 1107e; p. 316h.

⁴³⁰ In *Standard Chartered Bank v. International Tin Council and others*, Bingham J showed himself hostile to using the law of State immunity as an aid to the proper understanding of the immunities enjoyed by an international organization, even though the latter immunities were enacted in an order in council: see the passage from his judgment quoted in last year's volume of this *Year Book* at p. 403 n. 14; though see also p. 403 n. 16.

⁴³¹ p. 1109e; p. 318f. Kerr LJ held the 'basis' of State immunity to be 'the existence of a "par in parem" relationship' between the State acceding and the State according immunity: p. 1109a-e; p. 318d-e. However, he did not then engage in abstract analysis of whether the EEC might be deemed the 'par' of a State. Rather, entertaining no presupposition that such a relationship is confined to States, he held that the existence of such a relationship between a State and the EEC depends on whether States have recognized the EEC to be entitled to immunity under international law. The notion of a 'par in parem' relationship thus played no effective part in his reasoning: what mattered was to discover whether States have recognized such a relationship to exist, and have consequently recognized there to

there has been no recognition of any immunity of the EEC by anyone. It was not suggested that any foreign state, or any foreign courts, have recognised such a claim. Nor has any such recognition been indicated on behalf of the executive organs of the government of the United Kingdom. No certificate about the status of the EEC in this connection was asked for or provided by the Secretary of State for Foreign Affairs. And although the Attorney-General was represented in the winding-up and receivership appeals on behalf of the United Kingdom, he has not appeared in support of the EEC's claim to sovereign immunity. Indeed, as counsel for the EEC conceded, this is the first occasion on which any claim to sovereign immunity has been made anywhere on behalf of the EEC.⁴³²

Consequently, as Gibson LJ held:

No rule of customary international law, to the effect that the EEC should be accorded such immunity, and which the common law of this country would be required to apply, is shown to exist.⁴³³

The EEC was, therefore, not entitled to jurisdictional immunity at common law.⁴³⁴

Three points are worthy of note in this connection. First, the Court of Appeal apparently assumed that, if the UK had been bound under customary international law to accord immunity before its courts to the EEC, then it would necessarily have followed that the EEC was entitled to immunity in English law. This assumption, implicit in the judgment of Kerr LJ, was made express by Gibson LJ in the passage quoted above.⁴³⁵ The Court thus seems to have shared the view of the nature of the relationship between English law and customary international law which was favoured by the Court of Appeal in the celebrated case of *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*:⁴³⁶ namely, that 'the rules of international law from time to time in force are automatically incorporated into the common law'.⁴³⁷

be an international obligation to grant immunity to the EEC. If they had recognized such an obligation, then English courts would be bound to give effect to it (see text at nn. 435–8, below). This might be said to be because the English courts would then consider there to be a 'par in parem' relationship between the UK and the EEC. However, this would add nothing to the fact that immunity would then be accorded for the simple reason that customary international law required it to be.

Kerr LJ added that, for a State to be entitled to immunity, the existence of a 'par in parem' relationship, 'and of the claimant's consequent right to immunity', must also be recognized 'by the executive or legislature of the state in whose courts the claim to immunity is asserted': p. 1109c; p. 318e. In the case of a State, such recognition is accorded simply by the Foreign and Commonwealth Office recognizing the claimant to be a State. The English courts then deem the claimant a State and apply to it the rules of English law appropriate to such entities, including the rules of State immunity. In the context of the present matter, the UK clearly recognizes the EEC. The question was, rather, whether there is a rule of English law which entitles the EEC to immunity before the English courts. However, to determine whether such a rule exists, Kerr LJ attached considerable significance to the practice of the UK Government as revealing its attitude to the EEC's entitlement to immunity under customary international law. See the passage quoted immediately below.

⁴³² p. 1109d–f; p. 318g–h.

⁴³³ p. 1158f; p. 359c.

⁴³⁴ Kerr LJ added that '[s]overeign states can at least generally be sued in their own courts. But . . . if there were any substance in [the EEC's] claim, then the EEC would evidently be immune everywhere', even in Luxembourg; p. 1109f; p. 318h.

⁴³⁵ At n. 433.

⁴³⁶ Loc. cit. above (n. 51).

⁴³⁷ The formulation is that of Nourse LJ: p. 1116b; p. 324g. Nourse LJ added that rules of customary international law thus incorporated into English law, 'subject always to statute, are supreme': loc.

Indeed, Nourse LJ held that this view—the so-called doctrine of ‘incorporation’—must now be accepted as the prevailing law.⁴³⁸ Secondly, the Court of Appeal did not determine the EEC’s right to immunity by considering whether there exists a rule of customary international law entitling international organizations in general to immunity before national courts, assuming that, if there was such a rule, then the EEC, as an international organization itself, would fall within its ambit.⁴³⁹ Rather, their Lordships considered solely the specific case of the EEC, looking to see whether that organization in particular has been recognized as entitled to immunity by virtue of a rule of customary international law. The Court’s conclusion that the EEC is not so entitled should not, therefore, be taken as denying the existence of a wider rule relating to certain categories or types of international organizations or even to international organizations in general.⁴⁴⁰ Thirdly, Kerr LJ stated that, while the EEC might not be entitled in English law to immunity from the jurisdiction of the English courts, the doctrine of non-justiciability laid down by the House of Lords in the case of *Buttes Gas and Oil Co. v. Hammer (Nos. 2 and 3)*⁴⁴¹ might nevertheless apply to certain acts performed by the EEC or by any other international organization. Thus Kerr LJ remarked that, where that doctrine applies:

the transactions of the EEC would certainly be entitled to the same ‘judicial restraint or abstention’ . . . as those of sovereign states, if and in so far as the issues raised in any particular litigation rendered it clearly inappropriate for our courts to pronounce on them. But that aspect is more appropriately categorised as non-justiciability in relation to acts of state or other transactions of international entities. In the main, such entities would of course be foreign sovereign states . . . But in appropriate situations, they might well include associations of states, such as the EEC, and even international organisations.⁴⁴²

In conclusion, if they had succeeded in establishing their alleged causes of action, then, subject to certain possible defences which might have been

cit. In contrast with the opinion described in the text, this notion was not expressed by any of their Lordships in the *Trendtex* case. Lord Denning MR and Shaw LJ held that, when a rule of customary international law is ‘incorporated’ into English law, the resulting rule of English law changes to reflect changes in its companion rule of international law. However, they did not hold that an existing rule of common law which does not represent an ‘incorporated’ rule of customary international law is superseded by a new rule of English law ‘incorporating’ a new rule of customary international law if such a rule of international law arises whose effect is inconsistent with that of the existing rule of common law. This point they passed over *sub silentio*.

⁴³⁸ p. 1116b–c; p. 324g–h.

⁴³⁹ It may be noted that Kerr LJ, in the passage quoted at n. 442, below, categorizes the EEC as ‘an association of states’, distinguishing it from ‘international organisations’.

⁴⁴⁰ In *Standard Chartered Bank v. International Tin Council and others*, Bingham J remarked that international organizations are not entitled to jurisdictional immunity at common law: see last year’s volume of this *Year Book* at p. 403 n. 14. This passage must now be read in the light of the Court of Appeal’s espousal of the doctrine of incorporation (see text at nn. 435–8, above) and its apparent readiness to grant the EEC immunity if it was entitled to it under customary international law. See further *ibid.*, p. 403 n. 15; and cf. n. 66 and text at n. 284, above.

⁴⁴¹ *Loc. cit.* above (n. 129).

⁴⁴² p. 1108d–e; p. 317g–j.

raised,⁴⁴³ the plaintiffs would have been able to recover their debts from all of the defendants, neither the UK Government, nor the twenty-two foreign States members, nor the EEC being entitled to any immunity in respect of the present proceedings.⁴⁴⁴

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⁴⁴³ For one such possible 'defence' to the claims of at least certain of the plaintiffs, see text at nn. 248-52, above. Furthermore, the defendants contended that, even if they were liable to the plaintiffs, the plaintiff brokers have nevertheless disentitled themselves from recovering from them the sums due under their contracts with the ITC, since, by obtaining arbitral awards for those sums against the ITC, they have elected to look for payment to the ITC and to the ITC alone. This argument, if successful, would have established a defence to the plaintiffs' claims, rather than a ground for striking out their actions, and, though characterizing it as 'unattractive', Kerr LJ consequently did not think it necessary to consider its merit: p. 1106b-c; pp. 315j-316a. Nourse LJ, however, declared it to be 'wholly misconceived': p. 1130g; p. 336d.

⁴⁴⁴ Owing to considerations of space, it has not been possible to note several decisions of the British courts which appeared in 1988. (References to four of these decisions can be found in nn. 2, 4 and 108, above. The fifth decision is *R v. Secretary of State for the Home Department, ex parte Sivakumaran and conjoined appeals (UN High Commissioner for Refugees intervening)*, [1988] 2 WLR 92, [1988] 1 All ER 193.) These decisions will be noted in next year's volume of this *Year Book*.

B. PRIVATE INTERNATIONAL LAW*

Jurisdiction to restrain foreign proceedings

Case No. 1. In contemporary British private international law there are three jurisdictional contexts in which discretion plays an important, and probably an increasingly important, role. They involve the power of an otherwise jurisdictionally competent court to stay its proceedings; the power of a court in certain specific, but often wide, circumstances to allow service of process upon an absent defendant; and the power of the court to order a defendant, over whom it has jurisdiction, either to refrain from instituting, or to discontinue, proceedings abroad. Historically courts were markedly (although in different degrees as between the three contexts) cautious in the exercise of these discretions. It was with regard to jurisdiction to stay proceedings that the winds of change first began to blow¹ and to blow refreshingly. However, disconcerting side squalls of uncertain force and direction were soon to be observed in the other two major areas of discretionary jurisdiction. This in its turn gave rise to a craving for ordered uniformity. That the same guide-lines for the exercise of discretion should be equally applicable in all three contexts had an obvious but meretricious attraction—meretricious because basic policy considerations operative in the three contexts are significantly different.

In the first-mentioned context the basic question is as to whether a plaintiff who has, in accordance with the normal rules, established the court's jurisdiction over the defendant should nevertheless be denied his right of access to the court. In the second-mentioned context the question is as to whether a plaintiff, who has failed to establish the court's jurisdiction over the defendant in accordance with those rules, should nevertheless be allowed to obtain access to the court as a result of being permitted to serve process upon an absent defendant. In the last-mentioned context, the question is as to whether a party who has been, or is likely to be, made a defendant in foreign proceedings may seek the English court's protection—the result of his success in this endeavour often in practice being that the case against him will be heard in an English court. That similar guide-lines (except of a most general sort) would be appropriate in these differing situations would appear at first sight to be improbable.

However, in 1986 the House of Lords did find itself able to accommodate the first two types of situation under a single, if somewhat loose, rubric. In *Spiliada Maritime Corporation v. Cansulex*,² a case itself concerned with an application to allow service out of the jurisdiction under RSC Order 11, rule (1), Lord Goff of Chieveley, having referred extensively to authorities on the staying of actions, said: 'It seems to me inevitable that the question in both groups of cases must be, at bottom, . . . to identify the *forum* in which the case can be suitably tried for the interests of all the parties and for the ends of justice'.³ The Scottish doctrine of *forum non conveniens* was embraced and made applicable in both contexts. The accommodation was made easier by differentiation in the matter of burden of proof—it

* © P. B. Carter, 1989.

¹ *The Atlantic Star*, [1974] AC 436, and this *Year Book*, 46 (1972–3), p. 428; *MacShannon v. Rockware Glass Ltd.*, [1978] AC 795, and this *Year Book*, 49 (1978), p. 291.

² [1987] AC 460. See this *Year Book*, 57 (1986), p. 429.

³ [1987] AC 460, 480.

being upon a defendant who seeks to stay proceedings and upon a would-be plaintiff who seeks leave to serve an absent potential defendant. It would seem, too, that assimilation even at the substantive level was not quite complete, for whereas in an application for a stay the defendant has to identify a *more* appropriate foreign *forum*, the applicant for leave to serve *ex juris* under RSC Order 11 must show that England would be the *most* appropriate *forum*.

Even before *Spiliada Maritime Corporation v. Cansulex Ltd.* there had been suggestions that the position in the third of the jurisdictional contexts listed above in which discretion plays a major role, namely applications to enjoin foreign proceedings, could be assimilated to that obtaining in cases of applications to stay English proceedings. This possibility was indeed envisaged in 1980 by no less a judge than Lord Scarman in *Castanho v. Brown and Root (UK) Ltd.*⁴ Reservations on this score were, however, subsequently voiced by Lord Goff in *South Carolina Co. v. Assurantie NV.*⁵ The position has now been clarified in the recent opinion of the Privy Council (also delivered by Lord Goff) in *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak.*⁶ This case appears to supply the final major piece in the newly created jigsaw of jurisdictional discretion. The facts of the case were as follows.

A Brunei business man resident in Brunei was killed in a helicopter crash there. The helicopter had been manufactured by a French company, was owned by an English company, and was operated and serviced by a Malaysian company. The plaintiffs, the widow of the deceased and the administrators of his estate, instituted proceedings in Brunei against the Malaysian operators and the French manufacturers; in France against the French manufacturers; and in Texas against (amongst others) the French company and its associated companies and the Malaysian company and its associates. The Texas court had jurisdiction over the French company because it carried on business in Texas. The French proceedings against the French company were subsequently discontinued, and the plaintiff's claim against the Malaysian company was settled. The French company applied unsuccessfully to the Texas court to dismiss the action there on grounds of *forum non conveniens*. Discovery took place and a date was fixed for trial in Texas. The French company then applied to the Brunei Darussalam High Court for an injunction to restrain the plaintiffs from continuing the Texas action. This was refused. The plaintiffs gave undertakings that they would agree to trial without a jury in Texas and they accepted that in the Texas trial the law of Brunei would be applicable on the issue of liability and as to *quantum* of damages, so that no claim would lie against the French company on the basis of strict liability or for punitive damages. The French company gave undertakings to protect the position of the plaintiffs and their Texas attorneys in Brunei, and to facilitate speedy trial of the action there. A contribution notice was served by the French company, on the Malaysian company, which intimated that it would submit to jurisdiction in Brunei, but not in Texas, and that it would accept service of a third party notice issued by the French company in Brunei. The French company accepted service in Brunei of a writ issued by the owners and insurers of the helicopter. The Brunei Darussalam Court of Appeal dismissed the French company's appeal against the refusal of the injunc-

⁴ [1981] AC 557.

⁵ [1987] AC 24, 45. See this *Year Book*, 57 (1986), p. 434.

⁶ [1987] AC 871.

tion they sought, holding that, having regard to the work done by the plaintiff's Texas lawyers, Texas had become the natural *forum*. However, the Privy Council allowed the French company's further appeal.

In the Court of Appeal reliance had been placed upon the speech of Lord Scarman in *Castanho v. Brown and Root (UK) Ltd.*⁷ where he had said: 'The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings', and he had accordingly transposed the text originally propounded by Lord Diplock in *MacShannon v. Rockware Glass Ltd.*⁸ in the former context, as follows: 'Transposed into the present context, this formulation means that to justify the grant of an injunction the defendants must show: (a) that the English court is a *forum* to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the [foreign] jurisdiction'.⁹ After referring to this Lord Goff, delivering the opinion of the Privy Council, observed that Lord Scarman's words had been 'substantially founded on the much-quoted dictum of Lord Diplock in *MacShannon v. Rockware Glass Ltd.* [1978] AC 795, 812, which has to a considerable extent been overtaken by the subsequent development of the law in *Spiliada's* case [1987] AC 460, 475-478, and 482-484'.¹⁰ Later in his judgment Lord Goff said:

If Lord Scarman's approach in *Castanho's* case were to be adapted to take account of the statement of principle expressed in *Spiliada's* case as applicable in cases of stay of proceedings, it would presumably read as follows. To justify the grant of an injunction, the defendant must show: (a) that the English court is the natural forum for the trial of the action, to whose jurisdiction the parties are amenable; and (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.¹¹

However, as his Lordship went on to point out, a principle so stated would in practice

have the effect that, where the parties are in dispute on the point whether the action should proceed in an English or a foreign court, the English court would be prepared, not merely to decline to adjudicate by granting a stay of proceedings on the ground that the English court was *forum non conveniens*, but, if it concluded that England was the natural forum, to restrain a party from proceedings in the foreign court *on that ground alone*. Their Lordships cannot think that this is right: . . . it leads to the conclusion that, in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural *forum*, the English court can arrogate to itself, by the grant of an injunction, the power to resolve the dispute.¹²

In short, the refusal to grant a stay must not automatically lead to the granting of an injunction, for the criteria to be applied in the exercise of discretion differ as between the two contexts. As Lord Goff pointed out, if the position were otherwise in a case such as *MacShannon v. Rockware Glass Ltd.*¹³ a Scottish court, having concluded that Scotland was the natural *forum* for the trial of the action, might for

⁷ [1981] AC 557.

⁸ [1978] AC 795, 812.

⁹ [1981] AC 557, 575.

¹⁰ [1987] AC 871, 891.

¹¹ *Ibid.* 895.

¹² *Ibid.* 895.

¹³ *Ibid.*

that reason alone grant an interdict restraining the plaintiffs from proceeding in England.

Earlier in his judgment Lord Goff had referred to principles that have evolved during the long history of the case law controlling the availability of injunctions restraining a party from commencing or pursuing foreign legal proceedings, and he concluded that 'the long line of English cases still provides useful guidance on the circumstances in which such injunctions may be granted; though of course the law on the subject is in a continuous state of development.'¹⁴ His Lordship's review of the case law included both the famous doctrinal explanation and/or apologia of Vice-Chancellor Leach in *Bushby v. Munday* that in granting an injunction 'this court does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the court . . .',¹⁵ and the salutary realism of Scrutton LJ in *Cohen v. Rothfield*¹⁶ when he admonished that, since an order does indirectly affect the foreign court, the jurisdiction is one which must be exercised with great caution. Lord Goff referred, too, to the 'authority that the court will only restrain the plaintiff from pursuing the foreign proceedings if the pursuit of such proceedings is regarded as vexatious or oppressive'.¹⁷ Of this his Lordship said: 'though it should not be regarded as the only ground upon which the jurisdiction may be exercised, [it] is of such importance . . . that it is desirable to examine it in detail'.¹⁸ However, the Privy Council specifically concluded¹⁹ 'that the fact that the Scottish principle of *forum non conveniens* has now been adopted in England and is applicable in cases of stay of proceedings provides no good reason for departing' from long-established principles relating to the availability of injunctions.

Lord Goff said:

In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural *forum* for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign *forum* of which it would be unjust to deprive him.²⁰

His Lordship, however, added that 'as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction on appropriate terms'.²¹

Turning to the facts giving rise to the instant litigation Lord Goff had no doubt

¹⁴ Ibid. 896.

¹⁵ (1821) 5 Madd. 297, 307.

¹⁶ [1919] 1 KB 410, 413.

¹⁷ Ibid. 493.

¹⁸ [1987] AC 871, 893.

¹⁹ Ibid. 896.

²⁰ Ibid. 896.

²¹ Ibid. 896.

that the 'natural *forum*' was Brunei. Rejecting the contrary conclusion which had been reached in the Court of Appeal, his Lordship said that

their Lordships do not consider that the fact that the Texas lawyers had been so engaged [i.e. in seeking to obtain dismissal in Texas on the ground of *forum non conveniens* and in seeking discovery] during the period in question can possibly have the effect of now rendering Texas the natural *forum* for the trial of the action instead of Brunei . . . the Court of Appeal in concluding that Texas had replaced Brunei as the natural *forum*, took into account matters which ought not to have been taken into account.²²

His Lordship then laid down this rule:

The mere fact that the courts of Brunei provide the natural *forum* for the action is, for reasons already given, not enough in itself to justify the grant of an injunction. An injunction will only be granted to prevent injustice, and, in the context of a case such as the present, that means that the Texas proceedings must be shown in the circumstances to be vexatious or oppressive.²³

The position would then appear to be that the applicant for an injunction to restrain foreign proceedings against him bears a twofold burden. He must first show, not only that the foreign court is not the natural *forum*, but that the *forum* in which the injunction is sought is the natural *forum*. In the unlikely event of his only being able to show that a third country would be the natural *forum*, the court in which the injunction is sought would presumably not be disposed to intervene. Secondly, the applicant must show that to allow the foreign proceedings to commence or continue would cause him positive injustice. In most cases this latter will involve him in showing that in the circumstances the foreign proceedings would be vexatious or oppressive.

The only substantial link between this test, and that propounded in the *Spiliada* case for application in cases in which a stay of *forum* proceedings is sought or leave to serve an absent defendant is sought, would appear to lie in the concept of the natural *forum*. As this concept is common to all three contexts of jurisdictional discretion, findings relative to it in one context presumably have authoritative weight in the other two contexts.

The Privy Council found in *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak* that the appellants had discharged the heavy twofold burden resting on them, and that therefore an injunction should be granted restraining the plaintiffs from proceeding in Texas.

The appellant was, in fact, not able to show that the Texas proceedings were vexatious or oppressive on the ground that the plaintiffs were seeking in an inappropriate *forum* to impose a strict liability or liability for punitive damages which would not be available in the natural *forum*, because these points had been effectively neutralized by the plaintiff's various undertakings. There was, however, a different way in which to allow the Texas proceedings would be oppressive to the defendants. The Malaysian operating company contested the jurisdiction of the Texas court, but did not contest the jurisdiction of the Brunei court. It was, therefore, a distinct possibility that they would not be a party to any Texas proceedings. In these circumstances, if the defendants were held liable in Texas, they would have to commence separate proceedings, presumably in Brunei, in order to obtain

²² Ibid. 899.

²³ Ibid. 899.

any indemnity or contribution from them. This would be expensive and inconvenient. Moreover, the Texas judgment might not be accorded recognition in those subsequent Brunei proceedings. Lord Goff summarized this position thus:

So SNIAS [the defendants] are now, it appears, in the unenviable position that, if the plaintiffs are not restrained from continuing their proceedings in Texas, SNIAS may well be unable to claim over against Bristow Malaysia in those proceedings; and that, if held liable to the plaintiffs in the Texas court, they may have to bring a separate action in Brunei against Bristow Malaysia in which they may have to establish their own liability to the plaintiffs before they can be entitled to claim contribution from Bristow Malaysia, with all the attendant difficulties which this would involve, including the possibility of inconsistent conclusions on the issue of liability. Their Lordships are of the opinion that for the plaintiffs to be permitted to proceed in a forum, Texas, other than the natural forum, Brunei, with that consequence, could indeed lead to serious injustice to SNIAS, and that the plaintiff's conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive. Furthermore, no objection to the grant of an injunction to restrain the plaintiffs from continuing with these proceedings can be made by them on the basis of injustice to them, having regard to the undertakings given by SNIAS. It follows that, in their Lordships' opinion, an injunction should be granted.²⁴

The injunction was granted on terms, these provisionally being essentially based upon those contained in the defendants' various undertakings.

The Privy Council has clearly resolved much pre-existing uncertainty—that uncertainty itself deriving very largely from the developments over the past two decades in the other areas of jurisdictional discretion. However, as Lord Goff himself said, 'Of course the law on the subject is in a continuous state of development.'²⁵ One may conjecture that, although the concept of natural *forum* is now largely crystallized, the concept of 'oppression' may be ripe for refurbishment. Moreover, the part to be played by the 'undertakings' of parties in this area of the law is perhaps likely to be increased and elaborated.

Foreign penal laws

Case No. 2. In the recent case of *US v. Inkley*²⁶ the Court of Appeal refused to enforce a Florida judgment based upon a United States 'appearance bond' on the ground that English courts do not enforce foreign penal laws or foreign penal judgments. The defendant, a British subject, had been arrested in the United States in 1983 and charged with various offences in the nature of fraud relating to the sale or attempted sale of non-existent oil wells to citizens of the United States. Subsequently a United States District Court had released him on bail, it being a condition of the release that he entered into an 'appearance bond' in the sum of \$48,000. Later in the year the defendant's father died in England and the District Court then allowed him to be absent from the United States for up to 30 days. He returned to England where he remained. In 1985 the United States, as plaintiffs, obtained a final judgment in a Florida District Court for \$48,000, the amount of the bond, plus interest. The following year the United States, as plaintiffs, issued a writ in the English High Court to enforce that judgment in England. The Court of Appeal, reversing Gatehouse J, held that the High Court had no jurisdiction to entertain the plaintiff's action and that it should be struck out.

²⁴ Ibid. 902.

²⁵ Ibid. 896

²⁶ [1988] 3 WLR 304.

Purchas LJ, giving the judgment of the Court, referred to the approval by the Privy Council in *Huntington v. Attrill*²⁷ of the *dictum* of Gray J in the United States Supreme Court in *Wisconsin v. Pelican Insurance Co.*²⁸ to the effect that: 'The rule that the courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanours, *but to all suits in favour of the state* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties'. Of this *dictum* Lord Watson, giving the opinion of the Privy Council in *Huntington v. Attrill*, said: 'Their Lordships do not hesitate to accept the exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule'.²⁹ Purchas LJ referred, too, to Lord Watson's earlier statement that:

Judicial decisions in the state where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state.³⁰

Finally Purchas LJ made reference to what Ackner LJ said in *Attorney-General of New Zealand v. Ortiz*³¹ when that case was before the Court of Appeal:

Huntington's case makes it clear that the first part of Mr Gray's [counsel's] definition of foreign penal law, namely that it must be part of the criminal code of a foreign country, is not sustainable. The right which it is sought to enforce may be a right which arises under legislation which is essentially designed to regulate commercial activities such as company legislation which may well contain a penal provision. I agree with the judge that it cannot be right simply to categorise the statute sought to be enforced as a whole. The court must pay regard to the particular provision of the foreign law which it is sought to enforce . . .³²

Purchas LJ saw the following propositions as emerging from these³³ authorities:

(1) the consideration of whether the claim sought to be enforced in the English courts is one which involves the assertion of foreign sovereignty, whether it be penal, revenue or other public law, is to be determined according to the criteria of English law; (2) that regard will be had to the attitude adopted by the courts in the foreign jurisdiction which will always receive serious attention and may on occasions be decisive; (3) that the category of the right of action, i.e. whether public or private, will depend on the party in whose favour it is created, on the purpose of the law or enactment in the foreign state on which it is based and on the general context of the case as a whole; (4) that the fact that the right, statutory or otherwise, is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of this country; on the other hand, by whatever description it may be known if the purpose of the action is the enforcement of a

²⁷ [1893] AC 150.

²⁸ (1887) 127 US 265.

²⁹ [1893] AC 150, 157.

³⁰ *Ibid.* 155.

³¹ [1984] AC 1.

³² *Ibid.* 33.

³³ His Lordship also cited *Schemmer v. Property Resources Ltd.*, [1975] Ch. 273, the judgment of Lawrence LJ in *Banco de Vizcaya v. Don Alfonso de Bourbon y Austria*, [1935] 1 KB 140, and the speech of Lord Keith of Avonholm in *Government of India v. Taylor*, [1955] AC 491, in support of the view that refusal to enforce foreign penal and revenue laws is simply part of a wider refusal to enforce foreign public laws generally.

sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained; (5) that the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced in this country.³⁴

His Lordship then concluded:

Applying the above criteria to the facts of this case we have come firmly to the conclusion that the general context and background against which the appearance bond was executed was criminal or penal. The power to require the execution of the bond arose from section 3146 et seq. of the United States Code for Crimes and Criminal Procedure. The circumstances in which it came into existence were clearly criminal in nature and breaches of the conditions incorporated in it could give rise to further criminal process. Finally, the whole purpose of the bond was to ensure, so far as it was possible, the presence of the executor of the bond to meet justice at the hands of the state in a criminal prosecution. The fact that the obligations under the bond were the subject matter of a declaratory judgment in a civil court does not affect, in our judgment, the basic characteristic of the right which that judgment itself enforced, namely the right of the state as the administrator of public law and justice to ensure the due observance of the criminal law or the exaction of pecuniary penalties if that course was frustrated. Notwithstanding its civil clothing, the purpose of the action initiated by the writ issued in this case was the due execution by the United States of America of a public law process aimed to ensure the attendance of persons accused of crime before the criminal courts.³⁵

Although the precise issue in *US v. Inkley* had seemingly not previously fallen to be decided in a reported English case, the decision cannot be seen as making new law in any significant way. It is clearly consistent with the general pattern of established law. It is perhaps a corollary of this that no opportunity was taken to re-think basic policies.

A fundamental question must be as to why courts should refuse to enforce foreign penal laws or foreign penal judgments. Historically justification has been sought in terms of variations on the theme that the imposition of a penalty reflects the exercise by a State of its sovereign power, and that this can have no effect in the territory of another State. As late as 1955 Lord Keith of Avonholm in *Government of India v. Taylor*³⁶ had said (although seemingly without conviction) when speaking of the similar attitude taken by the courts with regard to foreign revenue laws, that 'one explanation' *'may be thought to be'* that 'an assertion of sovereign authority by one state within the territory of another . . . is (treaty or convention apart) contrary to all concepts of independent sovereignties'.³⁷ The notion was specifically invoked in the first, and again referred to in the fourth, of the five propositions enunciated in *US v. Inkley*. It is, nevertheless, it is submitted, scarcely adequate either as an analytical, or as a practical, explanation of the rule. The ultimate explanation at least in the case of foreign penal laws is rather to be found in more mundane considerations of policy and of practicality. As a matter of policy the content of the criminal law, its sanctions, the fact and the methods of its enforcement have been regarded as essentially and exclusively national or domestic matters. At the same time the rule is partly a consequence of the wide variety and often controversial nature of criminal penalties. Moreover, the enforcement of unfamiliar and

³⁴ [1988] 3 WLR 304, 312.

³⁵ Ibid. 312.

³⁶ [1955] AC 491.

³⁷ Ibid. 511. Italics supplied. This was cited by Purchas LJ in *US v. Inkley*: see n. 33, above.

alien penalties, even if not intrinsically objectionable, could present practical difficulties.

A question might be asked as to whether these policy and/or practical considerations reach out to a situation such as that with which the Court of Appeal was faced in *US v. Inkley*. The Court there was, of course, right to hold that it is for an English *forum* to characterize a foreign law or judgment as penal or otherwise. The English court may take account of the way in which the law or judgment is seen or classified in the foreign country concerned, but this is in no way conclusive. Of course, the Court of Appeal was right, too, not to be unduly influenced by the circumstance that the English action itself was in form a civil action. But *forum* characterization is ultimately a matter of policy. The weight and balance of policy factors may shift with the passage of time. It is to be noted that the two of the three cases principally relied upon by the Court of Appeal, *Wisconsin v. Pelican Insurance Co.* and *Huntington v. Attrill*, were decided respectively 102 and 96 years ago, and that the third, *Attorney-General of New Zealand v. Ortiz*, when it went to the House of Lords was decided on a different and much narrower ground. Attitudes have perhaps changed and are changing. Inhibitions concerning foreign criminal law are becoming less entrenched. Evidence of this is provided by, for example, the ever-growing proliferation of extradition treaties and by an increasing willingness to make provision for the supply of evidence to foreign criminal courts. Given the state of authority it was no doubt not open to the Court of Appeal in *US v. Inkley* to question the dogma that an English court will not enforce directly or indirectly a foreign penal law or judgment. It would, however, have been open to a bold court, faced with what it could have seen as a particular case of novel instance, to pause to assess the policy factors properly to be regarded as underlying the dogma, and to consider whether these factors required that what the plaintiff government was seeking be castigated as the *enforcement* of a *penal* law or judgment.

Acquisition of a domicile of choice

Case No. 3. It is axiomatic that the acquisition of a domicile of choice involves residence combined with, and coinciding with, the requisite intention. There has accumulated a considerable body of case law defining, refining and indeed developing the nature of that intention. In general terms what is required is proof of the formation by the propositus of an intention to remain permanently, or at least indefinitely, in the country in which it is sought to show that a domicile of choice has been acquired. On the other hand there has been relatively little judicial consideration of the nature of the residence necessary for the acquisition of a domicile of choice. More than 50 years ago Lord Macmillan did say: 'the residence must answer a qualitative as well as a quantitative test'.³⁸ The quantitative element can in fact sometimes be minimal. Length of residence is not important in itself. Residence for a few days may be enough;³⁹ and an immigrant can acquire a domicile of choice immediately upon arrival in a country in which he has a clear and firm intention to remain.⁴⁰ More elusive, however, is the nature of the qualitative element.

³⁸ *Ramsay v. Liverpool Royal Infirmary*, [1930] AC 588, 598.

³⁹ *Fasbender v. Attorney-General*, [1922] 2 Ch. 850, 857-8. See, too, *White v. Tennant*, 31 W Va 790; 8 SE 596 (1888), where the Supreme Court of Appeals of West Virginia held that a few hours sufficed.

⁴⁰ *Bell v. Kennedy* (1868), LT 1 Sc. & Div. 307, 319.

The difficulty was in a sense compounded in the recent revenue case of *Plummer v. Inland Revenue Commissioners*⁴¹ in that there the issue was to which of two apparent residences regard had to be had.

The facts (which in this type of case usually have to be set out in some detail) were as follows. A taxpayer had been born in London in 1965 of English parents, and it was not disputed that England was her domicile of origin. In 1980 her mother and younger sister moved permanently to Guernsey, but her father kept a residence in London where he worked as an accountant, joining his wife and younger daughter in Guernsey when he could at weekends and for holidays. It was not suggested that he had acquired a domicile in Guernsey before the taxpayer's sixteenth birthday in 1981: her domicile accordingly remained English at least until that date. After her mother's removal to Guernsey, she had continued to attend a private London day school, staying in a hostel during the week and going to Guernsey at weekends and for holidays. But in 1981 she moved to a boarding school in Somerset; then in 1983 Miss Plummer took a break for a year during which she attended a secretarial course in Hampstead, living in college accommodation and then in a shared flat in London. In 1984 she became a student at London University. During her first year there she lived in a college hostel, and during her second year (1985-6) she lived in a flat available to her father in London. While studying in London the taxpayer spent many weekends and some, but by no means all, of her holidays in Guernsey. She had formed a strong emotional attachment to Guernsey and she formed the intention to go to live there permanently when her education and any further training was completed. She had held a Guernsey passport since January 1984. She held a Guernsey driving licence as well as British and Florida licences. During the fiscal year 1983-4 she spent 106 days in Guernsey and during the fiscal year 1984-5 she spent 83 days there.

Her claim that during these two fiscal years she was domiciled outside the United Kingdom was rejected by the Inland Revenue Commissioners. Her appeal by way of case stated was dismissed by Hoffmann J.

The question to which the commissioners had initially addressed themselves was as to whether Miss Plummer had become an 'inhabitant' of Guernsey during the relevant period. Hoffmann J said⁴² that they were using the term 'inhabitant' in the 'specialised sense in which Nourse J used it in *Inland Revenue Commissioners v. Duchess of Portland*'.⁴³ His Lordship then quoted the following passage from Nourse J's judgment:

Residence in a country for the purposes of the law of domicile is physical presence in that country as an inhabitant of it. If the necessary intention is also there, an existing domicile of choice can sometimes be abandoned and another domicile acquired or revived by a residence of short duration in a second country. But that state of affairs is inherently improbable in a case where the domiciliary divides his physical presence between two countries at a time. In that kind of case it is necessary to look at all the facts in order to decide which of the two countries is the one he inhabits.

Hoffman J continued:

Speaking for myself, while I find the contrast between an inhabitant and a person casually present useful to describe the minimum quality of residence which must be taken up in a

⁴¹ [1988] 1 WLR 292.

⁴² *Ibid.*, 294.

⁴³ [1982] Ch. 314, 318-19.

new country before a domicile there can be acquired, the concept of being an inhabitant seems to me less illuminating in cases of dual or multiple residence such as the present.

His Lordship then found clearer guidance in the words of Lord Westbury in *Udny v. Udny*: 'Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention to remain there for an unlimited time'.⁴⁴ His Lordship accepted that a domicile of choice can be acquired without total abandonment of the former residence. He regarded the statement implying the contrary in *Dicey and Morris* Rule 13 (1) that 'A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely, and not otherwise' as not being apt in the case of two or more apparent residences. In such cases the chief residence must be identified. His Lordship concluded by affirming the holding of the commissioners in the instant case that Miss Plummer's chief residence had remained in England. She had not therefore acquired a domicile of choice in Guernsey.

Several comments may be offered although not relating directly to the decision itself.

First, a suggestion which permeates the first paragraph of *Dicey and Morris's* Comment on Rule 10 that the key to residence is to be found in a distinction between presence as an 'inhabitant' and presence 'casually or as a traveller' will be of limited value in many cases even apart from cases of dual or multiple residence. It is a distinction which, given the ascription of normal linguistic usage to the phraseology used, simply does not cover the whole of the possible factual field. A person may be present in a country on a frequent and regular basis, and perhaps for quite long periods at a time, without being aptly described as an inhabitant. The concept of 'inhabitant' is, however, useful provided it is accepted that the position of a person who is present 'casually or as a traveller' is not the only alternative.

Secondly, it is submitted that presence as an inhabitant, and thus residence for the purpose of determination of domicile, may, and often will, involve a distinctive mental element. Whereas the general intention requirement for the loss or acquisition of a domicile is essentially a present intention relating to the permanent or indefinite future, the mental element which will often bear upon a finding of residence is a present attitude and intention relating to contemporary physical presence. It would seem reasonable to suppose that if Miss Plummer were asked during the financial years 1983-5 where, regardless of her aspirations as to the future, perhaps even the near future, she saw herself as being currently principally resident, she would have replied 'in England'. Evidence of the present attitude of the propositus will not, of course, be conclusive, but it will often be indicative of habitation and residence.

Thirdly, it could perhaps be misleading and would indeed be unnecessary if a differentiation were to evolve in the formulation of the law of domicile between on the one hand what might be designated 'single residence' fact situations and on the other hand 'double or multiple' fact situations. In all cases the burden of proof of the acquisition of domicile choice is upon the party alleging it. What must be shown so far as the residence requirement is concerned is (in the words of Lord Westbury cited by Hoffmann J) the 'fact of a man fixing voluntarily his sole or chief residence in a particular place'. That he retained factual connection with his earlier domicile is without separate legal significance: it is simply a factor to be taken into

⁴⁴ (1896), LR 1 Sc. & Div. 441, 458.

account by the court when deciding whether in a particular case the burden of proof has been satisfied.

Finally, reference may be made to the case in which the issue is not as to whether a domicile of choice has been acquired, but as to whether such a domicile has been lost for the purposes of the archaic doctrine of the revival of the domicile of origin—there being no proof of the acquisition of a new domicile of choice. Whereas loss of domicile is simply a legal consequence of acquisition of a new domicile of choice, in the absence of such acquisition loss becomes a distinct issue. Loss of a domicile of choice in such circumstances involves loss of residence combined with the absence of an intention to return permanently or indefinitely. There would appear to be no reason to suppose that the meaning to be ascribed to the notion of residence in this context of loss differs from the meaning which it carries in the context of acquisition. A mental component may be involved. A court could hold that a person, who no longer intends to remain permanently or indefinitely in his previously acquired domicile of choice and has left, for example on a business trip or a holiday, but intends to return, has not lost that domicile.

Residence for the purposes of the law of domicile, although factually sometimes elusive, is a unitary legal concept.

Contract: the proper law and incorporation by reference of other laws

Case No. 4. In the course of his judgment in *Amin Rasheed Corporation v. Kuwait Insurance Co.*⁴⁵ Lord Diplock said:

My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they are made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations; . . .⁴⁶

Lord Wilberforce in the course of his judgment in the same case said:

There is nothing unusual in a situation where, under the proper law of a contract, resort is had to some other system of law for the purposes of interpretation. In that case, that other system of law becomes a source of the law upon which the proper law may draw . . . In such a case, the proper law is not applying a 'conflicts' rule (there may, in fact, be no foreign element in the case) but merely importing a foreign product for domestic use.⁴⁷

These two excerpts do not represent any necessary inconsistency. There is no inconsistency between the doctrine that the proper law of a contract must be a single identifiable actually existing system of private law, and the circumstance that such a system of private law may embody, or permit incorporation by reference of, particular elements of another system of private law. This general point has in effect been illuminated and exemplified in the recent House of Lords case of *For-sikringsaktieselskapet Vesta v. Butcher*.⁴⁸

The circumstances of that case were summarized by Lord Templeman thus.

My Lords, the business of the respondent Norwegian company, Vesta, comprises or includes the issue of insurance policies against the risk of loss from storm damage and other

⁴⁵ [1984] AC 50.

⁴⁶ Ibid. 65.

⁴⁷ Ibid. 69–70.

⁴⁸ [1989] 2 WLR 290.

catastrophe being suffered by Norwegian fish farmers. The business of the appellant underwriters includes the issues of reinsurance policies against the risk of loss being suffered by insurers of fish farmers in many parts of the world. Vesta insured a Norwegian fish farmer. Vesta effected reinsurance with the underwriters for 90 per cent. of the liability of Vesta to the fish farmer. The fish farmer suffered loss as a result of storm damage and Vesta paid the loss. In these proceedings Vesta seek to recover 90 per cent. of the loss from the underwriters. The trial judge (Hobhouse J) and the Court of Appeal (O'Connor and Neill LJ and Sir Roger Ormrod) found in favour of Vesta. The underwriters appeal.

When both the insurance policy by Vesta in favour of the fish farmer and the reinsurance policy by the underwriters in favour of Vesta were under negotiation, the brokers required both policies to incorporate the following terms:

'Special conditions and warranties

'It is warranted that a 24-hour watch be kept over the site.

'Claims control clause

'In the event of loss hereunder, no payment, offer or compromise shall be made without the consent of underwriters who shall have sole control of all negotiations.

'Failure to comply with any of the warranties outlined hereunder will render this policy null and void. All warranties to be completed at the assured's expense'.

A 24-hour watch was not kept on the fish farm so that there was a breach of warranty in each policy. Under Norwegian law, which governed the insurance policy issued by Vesta to the fish farmer, the breach of warranty did not render the policy null and void, despite the express words of the policy, because the breach was irrelevant to the loss. A 24-hour watch could not have prevented the loss of fish caused by the storm. Under English law, which governed the reinsurance policy issued by the underwriters to Vesta, the breach of warranty, whether relevant to the loss or not, rendered the reinsurance policy null and void. Therefore, say the underwriters, they are not liable to pay Vesta under the reinsurance policy although Vesta were liable to pay the fish farmer under the insurance policy.⁴⁹

Lord Lowry in the course of his judgment said:

The question for decision, as between Vesta and the underwriters, is whether the 24-hour watch warranty should, as the courts below have held, be given, in spite of the principles in English law, the same meaning and effect in the contract of reinsurance as it had in the Norwegian contract of insurance. If Yes, the appeal fails and the underwriters are liable on their contract with Vesta; . . . ⁵⁰

The House was unanimous in holding that the appeal failed.

The trial judge, Hobhouse J, while acknowledging that 'it is the almost invariable rule that there is only a single proper law of a contract', had said that 'it has been recognised for a long time that parties may choose that different parts of the contract should be governed by different laws'.⁵¹ Again, later in his judgment his Lordship, while stating that 'The reinsurance contract itself is and remains an English law contract but it is one which is made with reference to, and on the terms of, the Norwegian law contract of original insurance', went on to hold that 'the proper law of the reinsurance contract is English law subject to the construction and effect of the clauses of the Aquacultural wording [i.e. the inserted clauses containing a

⁴⁹ Ibid. 293-4.

⁵⁰ Ibid. 301.

⁵¹ [1986] 2 All ER 488, 504-5. The only authority for this latter statement cited by Hobhouse J was a dictum of Lord Herschell LC in *Hamlyn & Co. v. Talisker Distillery*, [1894] AC 202, 207, and a statement of Upjohn J sitting at first instance in *In re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 340. His Lordship also referred to a passage in Dicey and Morris, *Conflict of Laws* (10th edn., 1980), p. 749. It may be, however, observed that referring to possible 'splitting' of the contract the passage concludes that 'For this to be done the circumstances must be "unusual" and "compelling" '.

warranty that a 24-hour watch would be kept on the site] being determined in accordance with Norwegian law in the same manner as they are as part of the contract of original insurance'. Hobhouse J saw this as a 'hybrid and admittedly somewhat unorthodox conclusion'.⁵²

The underlying question is as to whether (1) resort was had to Norwegian law simply because the parties intended that the contract of reinsurance, although governed in other respects by English law, should with regard to the construction of the clauses be governed by Norwegian law, or (2) these clauses were to be construed according to Norwegian law because, and only because, they could be so construed under the English proper law. It is the distinction between choice of law and incorporation by reference: i.e. the distinction between diversified choice of law and incorporation by reference under a single chosen law. In the House of Lords the matter was squarely faced by Lord Lowry. His Lordship said: 'My Lords, I respectfully consider the problem to be one of construing the words in the reinsurance contract and not one involving an imputed choice of law'.⁵³ His Lordship later went on to say:

There is, in my view, no need to treat the reinsurance contract as partly governed by Norwegian law, except in the special sense that one must resort to Norwegian law in order to interpret and understand the meaning and effect of the No.V wording in *both* contracts. That is a different concept from 'the proper law of the contract' (or of part of the contract) . . .⁵⁴

The trial judge had found that the parties to the reinsurance contract intended that the construction and effect of the wording of the Aquacultural clauses should be determined by Norwegian law. Of this his Lordship had said: 'Whether one chooses to categorise this conclusion as an application of the English substantive law of construction of an English contract or as the application of the English choice of law rules does not matter. They are in the present context essentially the same thing'. It is suggested with respect that, although in the present context they would lead to the same result, they were not essentially the same thing. A critical case could be one in which, when construing a contract in accordance with the criteria of the proper law, resort to the criteria of another law would not be permitted under that proper law. The issue could then squarely be raised as to whether parties are able by their choice to dethrone *pro tanto* the proper law. The case for according this freedom is strongest when the proper law is itself based upon the parties' choice. The case is palpably less strong when the proper law is objectively based upon 'closest and most real' connection. The proper law of a contract is—almost by definition—the law most appropriate to govern all legal issues pertaining to the contract. Of course, it is well settled that the proper law does not have exclusive control over certain contractual issues such as those pertaining to formal validity, capacity and perhaps illegality. Modification of the role of the proper law in these contexts does not, however, depend (except sometimes very indirectly) upon the will of the particular parties. It derives from generalized policy considerations. To allow parties to opt out of the control of the proper law by submitting a particular issue (e.g. the interpretation of particular provisions) to some other law has a

⁵² [1989] 2 WLR 290, 306.

⁵³ *Ibid.* 312.

⁵⁴ *Ibid.* 313.

different dimension. The circumstances in which a proper law will not permit reasonable incorporation by reference of provisions of another law in relation to a particular issue will probably be rare. In practice, therefore, the case in which principle becomes important will tend to be that in which the parties have sought to concoct an overall pattern of law unacceptably remote from any known system of private law.

Contract: public policy and the lex loci solutionis

Case No. 5. Dicey and Morris Rule 184 states: 'The material or essential validity of a contract is (subject to the Exceptions hereinafter mentioned) governed by the proper law of the contract'.⁵⁵ The first of the ensuing Exceptions runs as follows: 'A contract (whether lawful by its proper law or not) is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*)'.⁵⁶ The second Exception is formulated thus: 'The validity or invalidity of a contract must be determined in accordance with English law, independently of the law of any country whatever, if and so far as the application of foreign law would be opposed to the public policy of English law'.⁵⁷ The judgment of Phillips J in the recent case of *Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd.*⁵⁸ provides interesting commentary bearing upon the interaction of the matters with which these two Exceptions to the *Dicey and Morris* Rule deal.

The facts of the *Lemenda Trading* case were these. In 1984 the defendants had entered into a contract with Qatar General Petroleum Company (QGPC), a state-owned and -controlled national oil corporation of Qatar, for the supply to them of 750,000 barrels of crude oil per month. The contract was for six months' duration but was renewable by agreement between the parties. The proper law of this supply contract was the law of Qatar. Early the following year the defendants entered into an agreement with the plaintiffs under which, if the plaintiffs procured renewal of the defendants' supply contract, they would be paid commission of 30 US cents per barrel. The supply contract was renewed with effect from 1 August 1985 for a quantity of 30,000 barrels a day. The defendants claimed that the commission was payable only if the supply contract had been renewed by 1 April 1985. It was accepted that the commission agreement was governed by English law. Nor was there any dispute as to the general nature of the agreement. The principal shareholder in the plaintiff company (a Mr Yassin) was to use personal influence within the national oil corporation of Qatar in an endeavour to procure renewal of the supply contract. There was some disagreement as to whether Mr Yassin's duties would be confined to 'working on' or 'lobbying' the managing director or would extend to using his influence with the minister himself. But of this, Phillips J said: 'Whichever be correct, the first question that it seems appropriate to consider is whether an agreement to pay commission for such services is one which English courts will enforce'.⁵⁹ On the basis of agreed evidence as to the law of Qatar Phillips J found *inter alia* that 'The agreement between the parties involved

⁵⁵ *The Conflict of Laws* (11th edn., 1987), p. 1213.

⁵⁶ *Ibid.* 1218.

⁵⁷ *Ibid.* 1225.

⁵⁸ [1988] 2 WLR 735.

⁵⁹ *Ibid.* 739.

a transaction which was contrary to public policy in Qatar. In consequence the agreement was void under the law of Qatar and unenforceable in Qatar'.⁶⁰

His Lordship considered the matter from the standpoint of possible illegality under the Qatar *lex loci solutionis* and from the standpoint of the public policy of the English *forum*. With regard to the former the learned judge said:

There are two allied principles of English law that the defendants invoke in this case: 1. A contract (whether lawful by its proper law or not) is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed: *Ralli Brothers v. Compania Naviera Sota y Aznar* [1920] 1 KB 614; [1920] 2 KB 287. 2. An English contract should and will be held invalid on account of illegality if the real object and the intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of that country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally: *Foster v. Driscoll* [1929] 1 KB 470. Mr Bean, for the defendants, submitted that the agreement in the present case was for the performance of a transaction that was illegal under the law of Qatar, a friendly state, and that in consequence the agreement should not be enforced by the English courts. In reply to this Mr Silber made two points: (i) the agreement did not require, and the parties did not intend, that it should necessarily be performed in Qatar. (ii) The transaction which formed the subject matter of the agreement between the parties was not illegal under the law of Qatar; it was merely contrary to the public policy of that country. I shall deal with each point in turn.⁶¹

In dealing with the former point Phillips J referred⁶² to the fact that there have been a number of cases⁶³ in which a defendant has attempted to avoid payment of money due under an English contract on the ground that such payment would be illegal under the law of the country where it could be made in accordance with the terms of the contract, but in which he has been unsuccessful in this attempt because payment could alternatively be made in another country where it would be perfectly lawful. His Lordship found these cases not applicable in the instant case, because although the parties had not agreed expressly as to how or when Mr Yassin was to use his influence, on the fact it was clearly contemplated that this would be within Qatar and not elsewhere.

It is submitted, however, that there is another respect in which the case before Phillips J was not on all fours with the earlier cases. The present action was not an action to compel Mr Yassin to perform his obligations under the agreement. It was an action in which it was sought to compel the other party to perform its obligations. A more apt comparison would, therefore, be with the possibility of that party's obligations being discharged elsewhere.

Dealing with the plaintiff's alternative contention, namely that the agreement was not illegal under the law of Qatar, but was merely inimical to the public policy of Qatar, his Lordship did see 'a clear distinction between acts which infringe public policy and acts which violate provisions of law'.⁶⁴ It is to be observed that his Lordship had earlier found that 'The agreement between the parties involved a

⁶⁰ Ibid. 740.

⁶¹ Ibid. 741.

⁶² Ibid. 741.

⁶³ *Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 KB 678; *Toprak Mahsulleri Ofisi v. Finagrain*, [1979] 2 Lloyd's Rep. 98; *Libyan Arab Foreign Bank v. Bankers Trust Co.*, *The Times*, 19 September 1987.

⁶⁴ [1988] 2 WLR 735, 742.

transaction which was contrary to public policy in Qatar. In consequence the agreement was void under the law of Qatar and unenforceable in Qatar'.⁶⁵ The formulation of this finding would appear to cut across a 'clear distinction'. His Lordship, however, continued on the basis of the distinction:

I have been referred to no decided case that supports the proposition that the English courts should, as a matter of comity, refuse to enforce an English law contract on the sole ground that performance would be contrary to the public policy of the country of performance. The public policy of Qatar cannot, of itself, constitute any bar to enforcement of the agreement in this case.⁶⁶

In the light of the earlier finding this would seem to mean that even if the effect of contravention of public policy is to render a contract void under the law of the place of performance, provided that this is the only reason for invalidity, it will not render the contract invalid in England. The scope of the first Exception to *Dicey and Morris* Rule 184 set out above must then be seen as not extending to situations in which the illegality under the *lex loci solutionis* derives exclusively from public policy. The justification for such a limitation is not immediately apparent. Why, it might be asked, should an English court be more willing to disregard an illegality under a foreign *lex loci solutionis* based simply upon public policy than it is to disregard an illegality based upon a rule of law—perhaps a highly technical rule of law? This in its turn may provoke more fundamental doubts about the justification for the Exception itself.⁶⁷

However, one cannot be completely confident of the significance of the *Lemenda* decision in this regard because, although Phillips J did find that the consequence of contravention of public policy was that 'the agreement was void under the law of Qatar',⁶⁸ later in his judgment his Lordship said:

The agreed report of Mr Majdalany does not state that agreements for the payment of commission to intermediaries in connection with an oil supply agreement entered into with QGPC violate any provision of the law of Qatar. What Mr Majdalany does state is that it is the official policy of the Government of Qatar to prohibit such agreements. Thus, he says, 'as a matter of official practice' payment of commission is prohibited and accordingly contrary to public policy in the State of Qatar.⁶⁹

The actual result in the *Lemenda* case to the effect that the plaintiff's claim for commission must fail was based, not upon illegality under the law of Qatar, but upon the public policy of the English *forum*. It is, therefore, a decision to be seen as being within the scope of the second, rather than the first, of the *Dicey and Morris* Rule 184 Exceptions set out above.

It is, of course, axiomatic that an English court will not entertain any action, whether in contract or otherwise, when to do so would be contrary to its public policy. It is, however, generally accepted that the notion of public policy may be differently, and should generally be more narrowly, interpreted in cases in which the facts giving rise to the litigation have an international complexion than in cases in which the facts giving rise to it are essentially local. National standards of public

⁶⁵ Ibid. 740.

⁶⁶ Ibid. 742.

⁶⁷ On this larger issue, see Mann, this *Year Book*, 18 (1937), p. 97; and Carter, *ibid.* 57 (1986), p. 1, at pp. 28–32.

⁶⁸ [1988] 2 WLR 735, 740.

⁶⁹ Ibid. 742.

policy are not to be mechanically applied transnationally. Phillips J voiced welcome acknowledgment of this differentiation when he said:

Had the agreement related to the procurement of a contract from a British Government department or state-owned industry, I am in no doubt that it would have been unenforceable by reason of English public policy. Is this a policy to bar enforcement having regard to the fact that performance of the relevant obligation was to take place not in England but in Qatar? This is no easy question.⁷⁰

His Lordship went on to state that

Some heads of public policy are based upon universal principles of morality. . . . Where a contract infringes such a rule of public policy the English court will not enforce it, whatever the proper law of the contract and whatever the place of performance. Other principles of public policy may be based on considerations which are firmly domestic. In such a case there would seem no good reason why they should be a bar to the enforcement of a contract to be performed abroad. Into which category does one place the principles of public policy that apply in the present case?⁷¹

His Lordship concluded that they fell into the former category: the plaintiff therefore failed in its claim to be paid commission under the contract.

What is of special interest is a particular feature of the learned judge's reasoning that led to this conclusion. Earlier in his judgment, after indicating that the public policy of the *locus solutionis* will not 'itself' constitute a bar to enforcement in an English *forum*, he went on: 'It may, however, be a relevant factor when considering whether the court ought to refuse to enforce the agreement in this case under principles of English public policy'.⁷² In the circumstances of the case it would seem to have been a crucial factor. Phillips J said:

The practice of exacting payment for the use of personal influence, particularly when the person to be influenced is likely to be unaware of the pecuniary motive involved, is unattractive whatever the context. Yet it is questionable whether the moral principles involved are so weighty as to lead an English court to refuse to enforce an agreement regardless of the attitude of that country to such a practice . . . It is at this stage that, in my judgment, it becomes relevant to consider the law of Qatar. . . . In the present case Qatar, the country in which the agreement was to be performed and with which, in my view, the agreement had the closest connection, has the same public policy as that which prevails in England. Because of that policy, the courts of Qatar would not enforce the agreement.⁷³

Few would deny that there are many sets of circumstances in which it would be appropriate for an English court, in considering whether or not to resort to public policy, to take account of the policy prevailing in the place of performance. In some such circumstances this might do little more than reflect the recognized head of public policy based on the undesirability of British courts acting in a way liable to jeopardize relations with a friendly State. In other circumstances it might stem from considerations of fairness to the parties in a multinational context. Again, few would deny that the result reached in the circumstances of the *Lemenda* case itself was entirely seemly.

However, Phillips J did conclude his judgment with the formulation of a rule, of apparently intended general applicability, in the following terms:

⁷⁰ Ibid. 744.

⁷¹ Ibid. 744.

⁷² Ibid. 742; and see n. 66, above.

⁷³ Ibid. 747.

In my judgment, the English courts should not enforce an English law contract which falls to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.⁷⁴

This formulation clearly contemplates treating (in cases coming within its reach) the public policy of the place of performance as something more than a mere factor which may be taken into account by an English court when considering resort to its own public policy. While the formulation does not limit the scope of public policy, it does lay down a positive rule of its particular applicability. To that extent it introduces into the operation of public policy an alien element—inflexibility. More specifically, it places emphasis upon the place of performance *per se*. It is noteworthy and perhaps significant that, in the course of his judgment in the *Lemenda* case itself, Phillips J had said: 'It is not entirely clear to me why the defendants accept that the proper law of the agreement is not that of Qatar—such a proposition would not seem beyond argument—'.⁷⁵ Again, towards the end of his judgment he referred to Qatar as the country 'with which, in my view, the agreement has the closest connection'.⁷⁶ The crucial case in which to test the appropriateness of the rule formulated by his Lordship would be that in which important contacts—the place of contracting, the nationalities, domiciles and residences of the parties, the situation of the subject matter, etc.,—were all with a third country, and the contract would be fully enforceable in that third country. Should an English court be *compelled* to regard the contract as unenforceable simply because on grounds of public policy (founded on general principles of morality) it would be so regarded in a purely domestic English context and would be similarly so regarded in the place of a party's performance? Perhaps, but perhaps not.

Actions on foreign judgments: fraud, natural justice and substantial justice

Case No. 6. The action before the Court of Appeal in *Jet Holdings Inc. v. Patel*⁷⁷ was a common law action on a Californian judgment. The defence was first that the judgment had been obtained by fraud. Alternatively, it was contended that the proceedings in which the judgment had been obtained involved a contravention of the precepts of natural justice and/or of English notions of substantial justice. The facts of the case, as Staughton LJ said at the outset of his judgment, were 'on any view unusual'. They may be summarized (somewhat colourlessly) as follows.

The plaintiffs, three United States companies, had brought an action against the defendant in California to recover sums alleged to have been misappropriated by the defendant while he was in their employ in California as an accountant. The defendant, who had returned to England, had entered an appearance and cross-claimed for punitive damages for actual and threatened violence, which he alleged had been directed at him by, or on behalf of, the president of the plaintiff companies, this being with the object of inducing him to repay the money allegedly owed. All this was denied by the president of the companies. The Californian court

⁷⁴ Ibid. 747.

⁷⁵ Ibid. 741.

⁷⁶ Ibid. 747.

⁷⁷ [1988] 3 WLR 295.

had made Orders requiring the defendant to provide a deposition and to be medically examined in Los Angeles, despite his opposition to this on the ground that, in view of the violence and the threats which he had previously suffered, he feared that his life would be in danger if he were to go to Los Angeles. The Californian court also made an Order that the defendant's expenses incurred in coming to Los Angeles and, if necessary, the cost of a security guard while he was there, should be defrayed by the plaintiffs. However the defendant did not comply with the Orders, and the plaintiffs then obtained judgment against him by default. By this time he was no longer legally represented since, he claimed, he was unable to pay lawyers because the plaintiffs had extorted money from him by violence and threats.

The plaintiffs brought an action in the English High Court on the judgment of the Californian court. It was in response to the plaintiffs' summons for summary judgment under RSC Order 14 that the defendant sought leave to defend on the ground that the Californian judgment had been obtained by fraud, or had been obtained in breach of the principles of natural justice and/or English notions of substantial justice. The Court of Appeal, reversing the trial judge, held that there was an issue to be tried as to whether the defendant was entitled to resist enforcement of the judgment on the ground of fraud.

Dealing with the defence of fraud, Staughton LJ, who gave the judgment of the Court, first re-iterated traditional doctrine, going back to *Abouloff v. Oppenheimer & Co.*⁷⁸ and more particularly *Vadala v. Lawes*,⁷⁹ that a foreign judgment can be impeached for fraud even if the allegation of fraud has been made, investigated and rejected in the foreign court. It is clearly implicit in this that the view of the foreign court on the issue of fraud is virtually immaterial. Staughton LJ went further and held that it is irrelevant whether the fraud is said to go directly to the merits of the cause of action or is a 'collateral' fraud. In both cases, when considering the issue of fraud, said his Lordship, 'the English courts have to consider the facts afresh without regard to the decision of the foreign court'.⁸⁰

What is of particular interest in assessing the significance of the decision in *Jet Holdings Inc. v. Patel* derives initially from the following passage in the judgment:

The defendant's case before us was not that there was fraud in the cause of action itself. He does not resist enforcement on the ground that he had misappropriated none of the plaintiff's money, and that the plaintiffs were fraudulent in asserting that he had misappropriated money. So, in a sense, his allegation here is of collateral fraud. He asserts that the plaintiffs' conduct was fraudulent in (1) assaulting him with violence and threats, so that he was afraid to go to California; (2) obtaining \$100,000 from him by those means, so that he was unable to afford continuing legal representation in California; and (3) failing to invite the Californian court to take that \$100,000 into account against the plaintiffs' claim. Factually ground (3) seems to be not supported by the evidence. Alternatively, the defendant says that the Californian court was misled by the plaintiffs as to the true reason for his default.⁸¹

Staughton LJ noted that for Order 14 purposes the court had to take the facts to be as deposed to by the defendant in his affidavit, unless they were plainly untrue, and held that the evidence as to the factual grounds (1) and (2) could not for these purposes be rejected as plainly untrue. His Lordship continued:

⁷⁸ (1882), 10 QBD 295.

⁷⁹ (1890), 25 QBD 310.

⁸⁰ [1988] 3 WLR 295, 301-2.

⁸¹ *Ibid.*, 302.

It is, I think, clear that the plaintiffs' Californian lawyers were asserting to the court implicitly, and even to some extent expressly, that the defendant's account of violence, threats and fear was untrue. If in fact it was true, that assertion, together with the actual incidents relied on, is capable of amounting to fraud in this context.⁸²

This did not necessarily conclude the matter for it had to be shown that the Californian court was in fact misled. However, the Court of Appeal was unable to accept without evidence that, if the Californian court had believed that on three occasions the defendant had been subjected to threatened or actual violence, that he had been forced to hand over \$100,000, that in consequence he had no money left to pay lawyers, and that he was in genuine fear in going to the United States, it would nevertheless have given judgment against him in default for the sum of \$168,000 and \$500,000 punitive damages. Nor was the Court of Appeal able to accept without express evidence that the Californian court in those circumstances would have ordered the defendant to attend for medical examination in Los Angeles relying only on the protection of a security guard, when it could, for example, have ordered him to be examined in England. The Court of Appeal accordingly decided that there was an issue to be tried as to whether the defendant was entitled to resist enforcement 'at any rate on the ground of fraud'.⁸³ Several comments may be essayed.

First, the fraud alleged was acknowledged to be a 'collateral' fraud. This distinguishes the case from the two most important earlier authorities, *Abouloff v. Oppenheimer & Co.*⁸⁴ and *Vadala v. Lawes*.⁸⁵ In each of those cases the fraud alleged was that the foreign court had been misled as to the merits. The decision in *Jet Holdings Inc. v. Patel* in this sense gives an almost new and somewhat indeterminate dimension to the defence of fraud.

Secondly, suppose that there had been clear evidence that the Californian court was in no way misled, i.e., suppose that there had been clear evidence that, even if that court had believed all the defendant's allegations of fact, it would have acted in the way in which it did act, would the Court of Appeal then have enforced the judgment? One ventures to think (and, indeed, to hope) that it would not. It would, however, then have been impossible to rely for refusal upon the defence of fraud. This in its turn suggests that the true justification for refusal to enforce must lie elsewhere.

Thirdly, the Court in fact referred only briefly to the defendant's alternative defence, namely that the Californian judgment had been obtained in breach of the principles of natural justice and/or English notions of substantial justice. The Court did take the opportunity to point out that, if an English court considers that the foreign court has failed to observe the rules of natural justice, it is irrelevant that the foreign court might itself take a different view; and that accordingly the suggestion made in *Dicey and Morris*⁸⁶ implying otherwise is wrong. However, in the light of its reliance on the defence of fraud the Court of Appeal found it unnecessary to consider further the availability of the defence in the instant case.

It is submitted that if the defence as formulated had been considered it would have been desirable to differentiate between two elements in that composite formulation. The focus of the defence of denial of natural justice is upon procedural

⁸² Ibid. 303.

⁸³ Ibid. 303.

⁸⁴ Above, n. 78.

⁸⁵ Above, n. 79.

⁸⁶ Dicey and Morris, *The Conflict of Laws* (11th edn., 1987), p. 475.

shortcomings and moreover, fairly well-defined procedural shortcomings, such as inadequacy of notice or insufficiency of opportunity to present a case. The thrust of the defence of contravention of English notions of substantial justice is different and more general. It could almost be seen as an ultimate discretion to withhold recognition simply because in the eyes of the English *forum* justice was palpably not done. In the final analysis it represents a prerogative of the *forum*—but, of course, a prerogative not to be abused. It could be contended that in *Jet Holdings Inc. v. Patel* there had been no denial of justice in the strict sense: the defendant had been given ample notice of the Californian proceedings and had indeed entered an appearance there. He had been given the opportunity to present his case but had failed to take that opportunity. On the other hand, an English court could without in any way impugning the integrity or competence of the Californian court take the view that in all the circumstances and on the available evidence it was not clear that substantial justice had been done. This might have been a more appropriate course than placing reliance on the defence of fraud—a reliance which involved positing the availability of that defence in the ill-defined area of ‘collateral’ fraud, and a reliance which would have been negatived had there been clear evidence that the Californian court had not in fact been misled.

P. B. CARTER

DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1988*

Meaning of 'contestation' and 'civil rights and obligations' in Article 6(1)—right to a court (Article 6(1))—just satisfaction (Article 50)

*Cases Nos. 1 and 2. Pudas case.*¹ *Bodén case.*² In these cases, which both concerned Sweden, the Court held unanimously that there had been a violation of Article 6(1) of the Convention because in each case the applicant had not had the opportunity to challenge an administrative measure affecting him before a court. As regards the claims for just satisfaction under Article 50, it decided that the respondent State must pay the applicant in the first case the sum of 76,100 Swedish crowns, less 2,720 French francs, and the applicant in the second case 8,900 Swedish crowns, less 3,410 French francs, by way of compensation.

These cases arose out of applications lodged with the European Commission in March 1983 and January 1984. The applicant in the first case, Mr Pudas, ran a transport business for which he needed, and had obtained, a licence. In 1981, however, this was revoked by the local licensing authority and the applicant's appeals against this decision to higher administrative authorities, and ultimately to the Government, were unsuccessful. The second applicant, Mr Bodén, owned certain properties in the town of Falun which became the subject of a regional development plan. In 1979 the municipal council applied for, and was granted, an expropriation permit covering the area. In 1984, before the permit was finalized, the applicant agreed to sell the properties to the municipality. Two years later, in 1986, he repurchased them from the municipality for the same price.

Both applicants complained that the administrative procedures in which they had been involved were not subject to judicial supervision and on this account violated Article 6(1). In its reports of December 1985 and May 1986 the Commission unanimously agreed with this view and subsequently referred both cases to the Court.

The relevant part of Article 6(1) of the Convention provides:

In the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing . . .

The main issue in both cases was whether Article 6(1) was applicable, and in particular whether the domestic proceedings were such as to involve a '*contestation*' (dispute) over 'civil rights and obligations'.

In the *Pudas* case the Government argued that the granting of a transport licence did not give rise to any 'right' and that its revocation depended essentially

* © Professor J. G. Merrills, 1989. I should like to express my appreciation to the Registrar of the Court for his kind co-operation in the preparation of these notes.

¹ European Court of Human Rights (ECHR), judgment of 27 October 1987, Series A, No. 125. The Court consisted of the following Chamber of Judges: Ryssdal (President); Lagergren, Walsh, Macdonald, Russo, Gersing, De Meyer (Judges).

² ECHR, judgment of 27 October 1987, Series A, No. 125. The Court consisted of the following Chamber of Judges: Ryssdal (President); Lagergren, Gölcüklü, Pettiti, Macdonald, Bernhardt, De Meyer (Judges).

on an assessment of policy issues, neither capable of, nor suited to, judicial control. The Court, however, agreed with the Commission that this submission must be rejected. Subject to the possibility of revocation, the licence conferred a 'right' on the applicant in the form of an authorization to run a transport service in accordance with the prescribed conditions. Since it followed from 'generally recognized legal and administrative principles'³ that the authorities did not have an unfettered discretion as regards revocation, it was possible for the applicant to maintain that he was entitled to retain the licence. In his appeal Mr Pudas not only challenged the wisdom of the revocation as a matter of policy, but also denied its lawfulness. Moreover, the proceedings complained of were directly decisive for the right at issue.

The Government also submitted that any 'right' which might be involved was not a 'civil' right because the provision of public transport in Sweden carried the 'predominant stamp of a public-law activity'.⁴ Public authorities had the responsibility for providing transport facilities and, where this involved the use of a privately owned business, regulated and subsidized it. In the Court's view, however, these public law features did not remove the applicant's rights from the category of 'civil rights' for the purposes of Article 6(1). Relying on its previous case law concerning this type of question,⁵ the Court pointed out that Mr Pudas needed the licence to carry out his business activity. In Sweden the provision of transport services by private enterprise is a commercial activity involving a contractual relationship between the licence holder and his customers. The proceedings relating to the licence therefore concerned a determination of civil rights and obligations.

In the *Bodén* case it was agreed that the applicant's ownership of the properties in issue involved a civil right. The Government, however, maintained that the issue of the expropriation permit was entirely a matter of policy and that there was consequently no genuine '*contestation*' concerning questions of law or fact susceptible to judicial assessment.

The term '*contestation*', which is to be found in the French text of the Convention, has already been the subject of much judicial analysis.⁶ From this the Court extracted the following guiding principles:

- (a) conformity with the spirit of the Convention requires that the word '*contestation*' should not be construed too technically and should be given a substantive rather than a formal meaning;
- (b) the '*contestation*' may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised. It may concern both questions of fact and questions of law;
- (c) it must be genuine and of a serious nature;
- (d) civil rights and obligations must be the object, or one of the objects, of the *contestation*; the result of the proceedings must be directly decisive for such a right.⁷

Applying these principles to the facts of the case, the Court found that there

³ *Pudas* judgment, para. 34.

⁴ *Ibid.*, para. 36.

⁵ See the *Deumeland* case, Series A, No. 100, and this *Year Book*, 57 (1986), p. 456; and subsequently the *Baraona* case, Series A, No. 122, and this *Year Book*, 58 (1987), p. 488.

⁶ See, e.g., the *Bentham* case, Series A, No. 97, and this *Year Book*, 56 (1985), p. 358.

⁷ *Bodén* judgment, para. 30.

appeared to be a serious disagreement between the applicant and the Swedish authorities, which raised questions concerning the lawfulness, under the relevant legislation, of the issuing of the permit. Since the expropriation permit was clearly decisive for the applicant's property rights, this case, like the *Pudas* case, fell within Article 6(1).

In both cases the Government admitted that if the Court should find Article 6(1) applicable, the applicants had not been afforded the safeguards which it requires. In a brief review of the issue of compliance the Court confirmed that this was so since neither Mr Pudas nor Mr Bodén had remedies available to them under Swedish law which satisfied their 'right to a court'. There had accordingly been a violation of the Convention.

The only other issue which the Court found it necessary to consider was the question of 'just satisfaction' under Article 50.⁸ This provides:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

By way of just satisfaction both applicants claimed financial compensation for prejudice which they had allegedly suffered, together with reimbursement of their costs and expenses.

As regards pecuniary damage, the Court pointed out that there was no evidence in either case that if a judicial remedy had been available, the decision would have favoured the applicant. Accordingly, it decided that no award of compensation should be made under this head. The Court did consider, however, that the absence of a judicial remedy had caused Mr Pudas some non-pecuniary damage. Deciding the matter on an equitable basis, it fixed the amount of compensation due at 20,000 Swedish crowns. On the other hand, it held that in the circumstances of the *Bodén* case the finding of a violation of Article 6(1) in itself constituted adequate satisfaction.

As regards the applicants' claims for costs and expenses, some items of expenditure were not contested by the respondent Government. Others, however, were challenged on the ground that the causal link with the violation, the necessity for the expenditure, or its reasonableness, had not been established by the evidence. Agreeing with the Government on these points, the Court awarded only partial reimbursement of the disputed items, less the sums already paid in respect of legal aid before the Convention institutions.

These are further cases in a series in which the Court has been called upon to decide the bearing of Article 6 on proceedings with a significant public law aspect. Although they confirm a tendency to give the concept of 'civil rights and obligations' a broad interpretation,⁹ too much should not be read into the chambers' unanimity in these cases. As reference to *H v. Belgium* (Case No. 5) demonstrates,

⁸ In view of its decision in relation to Article 6(1) the Court in the *Pudas* case decided that it was unnecessary to examine claims which the applicant had based on Article 13 (right to an effective remedy before a national authority) and Article 1 of Protocol No. 1 (right of property).

⁹ It is interesting to note, however, that one member of the Court considered that the treatment of Article 6 in these judgments was too conservative. See the separate opinion of Judge De Meyer in the *Pudas* case.

when cases of this kind are considered by the full Court, procedural safeguards in areas not obviously within the scope of Article 6 are a matter on which there is room for more than one judicial view.

Discrimination on grounds of birth (Article 14)—right of property (Article 1 of Protocol No. 1)—application to rights of an heir—the meaning of ‘victim’ in Article 25—just satisfaction (Article 50)

*Case No. 3. Inze case.*¹⁰ In this case, which concerned a special aspect of the law relating to succession in Austria, the Court held unanimously that there had been a violation of Article 14, taken in conjunction with Article 1 of Protocol No. 1 of the Convention, because the applicant had been unable to inherit his mother's farm on account of his illegitimacy. It also decided that Austria must pay the applicant 150,000 Austrian schillings as compensation for damage and 80,606 schillings, subject to certain adjustments, in respect of his costs and expenses.

The applicant in this case was born out of wedlock in 1942. In 1975 his mother died intestate and after legal proceedings which ended in 1981, her farm was allocated to the applicant's half-brother M, who was born in wedlock in 1954. In reaching its decision the Austrian court applied the Carinthian Hereditary Farms Act 1903, which gave precedence to legitimate over illegitimate children. As a result of other proceedings a judicial settlement was reached between the applicant and M, under which the former renounced any claim to the farm in return for a certain piece of land which had been promised to him by his mother during her lifetime.

In his application to the Commission Mr Inze complained that he was a victim of discrimination on grounds of birth, contrary to Article 14 taken in conjunction with Article 1 of Protocol No. 1. In its report in March 1986 the Commission upheld this complaint by 6 votes to 4. The Commission and the Government then referred the case to the Court.

Before considering the merits the Court had to deal with a preliminary issue of admissibility under Article 25. This limits the jurisdiction of the Strasbourg organs to those individuals or organizations claiming to be the ‘victim’ of a violation of the Convention. The Government argued that in view of the settlement with his half-brother, Mr Inze no longer qualified as a ‘victim’, with the result that his claim was inadmissible. The Court rejected this argument. Following its previous case law, it pointed out that the existence of a violation does not depend on prejudice, and that in any case the settlement had only alleviated the financial consequences of the situation complained of and had been concluded when the applicant was ‘in a position of inferiority’¹¹ because he could no longer hope to obtain the farm. The applicant could thus still claim to be a ‘victim’ for the purposes of Article 25.

The substantive issue in this case concerned Article 1 of Protocol No. 1 which provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions . . . and Article 14 which provides:

¹⁰ ECHR, judgment of 28 October 1987, Series A, No. 126. The Court consisted of the following Chamber of Judges: Cremona (President); Thór Vilhjálmsson, Lagergren, Gölcüklü, Matscher, Pettiti, Bernhardt (Judges).

¹¹ Judgment, para. 33.

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . birth or other status.

The applicant did not allege a violation of Article 1 taken alone, and the Court did not find it necessary to examine the question *ex officio*. However, since Article 14 has no independent existence but complements the other provisions, the Court was required to ascertain whether the applicant's complaints fell within the ambit of Article 1. This provision, as the Court explained, guarantees the right of property. It protects existing possessions and does not give a right to acquire possessions in the future, but in the present case the applicant had already acquired a right under Austrian law to a share of his deceased mother's estate. Moreover, he and his co-heirs had already accepted their respective shares. Thus, despite the fact that none of the heirs had an immediate right to a specific asset and the applicant was, of course, disqualified from inheriting the farm, the estate was their joint property. The case therefore concerned existing property rights and so fell within the ambit of Article 1.

The main issue was whether, as a result of his disqualification, the applicant had suffered discrimination in relation to his property rights, contrary to Article 14. In its previous case law the Court has held that a difference of treatment is discriminatory if it has no objective and reasonable justification. In assessing whether a difference of treatment can be justified it has indicated that the Contracting States enjoy a certain margin of appreciation, the scope of which will vary according to the circumstances, the subject-matter and the background. The Court has also frequently made the point that the Convention is a 'living instrument' and must be interpreted in the light of present-day conditions. In the present case, as in previous cases concerning the issue of illegitimacy,¹² this principle was particularly important because there is now a marked tendency within the Council of Europe to treat children born in and out of wedlock on a basis of equality. As the Court explained, this is exemplified by the 1975 Convention on the Legal Status of Children born out of Wedlock, which has been ratified by nine States, including Austria. In the light of this evidence the Court concluded that very weighty reasons would have to be advanced before a difference of treatment on the ground of birth out of wedlock could be justified.

The Government put forward various arguments to justify the difference of treatment, but the Court found them all unconvincing. Either they were based on 'general and abstract considerations',¹³ such as the presumed intention of the deceased, or they related to the convictions of the rural population, an argument which the Court stated 'merely reflects the traditional outlook'.¹⁴ The Government itself had recognised the need for change and had prepared a Bill modifying the Carinthian legislation on the point in issue. Although this did not prove that the old rules were contrary to the Convention, it showed that ensuring that farms were inherited by those familiar with the property could be achieved by applying inheritance criteria other than that of birth in wedlock. Since the Government had failed to justify the discrimination against the applicant, there had been a violation of Article 14 taken together with Article 1 of Protocol No. 1.

¹² See the *Marckx* case, Series A, No. 31, and this *Year Book*, 50 (1979), p. 260, and the *Johnston* case, Series A, No. 112, and *ibid.*, 58 (1987), p. 463.

¹³ Judgment, para. 43.

¹⁴ *Ibid.*, para. 44.

There remained the issue of just satisfaction under Article 50. On the question of compensation the Court pointed out that although Article 1 of Protocol No. 1 did not entitle Mr Inze to inherit his mother's farm specifically, the Hereditary Farms Act had deprived him of a real opportunity to take it over. Moreover the judicial settlement with his half-brother did not completely compensate him for his loss. Since the loss of opportunities did not readily lend itself to precise quantification, the Court, making an assessment on an equitable basis, awarded Mr Inze the sum of 150,000 schillings. As regards the applicant's costs and expenses, the Court first awarded 25,539 schillings for costs incurred in Austria and rejected an argument by the Government that certain fees had not been necessary. With regard to legal fees before the Convention institutions, however, the Court accepted the Government's argument that the sum claimed was excessive. Considering the matter on an equitable basis, it awarded the applicant 80,606 schillings under this heading, to be reduced by the amount received in legal aid and increased by any turnover tax due.

In the *Marckx* case in 1979 the Court held that Article 1 of Protocol No. 1 'applies only to a person's existing possessions and . . . does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions'.¹⁵ The decision in the present case that Article 1 was relevant because the applicant already had the rights of a designated heir under Austrian law shows how questions of succession can nevertheless sometimes fall within this provision. The decision on Article 14 follows both the treatment of illegitimacy in *Marckx* and the point made in a number of previous cases¹⁶ that local sentiment is a weak justification for arrangements which are out of line with contemporary European standards. If Austria had not been a party to the 1975 Convention, or on ratification had made a reservation covering this issue,¹⁷ the case would have been less straightforward. However the Court's emphasis on the difficulty of defending this kind of discrimination today suggests that even in those circumstances its decision would have been the same.

Right to a hearing by an impartial tribunal (Article 6(1))—friendly settlement (Rule 48(2))

*Case No. 4. Ben Yaacoub case.*¹⁸ Having regard to the friendly settlement concluded between the Belgian Government and the applicant, the Court unanimously decided to strike this case out of the list.

¹⁵ ECHR, judgment of 13 June 1979, Series A, No. 31, para. 50.

¹⁶ See in particular the treatment of local opinion on corporal punishment in the *Tyrer* case, Series A, No. 26, para. 38, and the *Campbell and Cosans* case, Series A, No. 48, para. 29, and compare the treatment of local opinion on homosexuality in the *Dudgeon* case, Series A, No. 45. For further discussion of this point see Mcrrills, *The Development of International Law by the European Court of Human Rights* (1988), pp. 130–4.

¹⁷ Article 9 of the 1975 Convention provides that 'a child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock'. When Austria ratified the Convention with effect from 29 August 1980 it did so with the following reservation which was not relevant in the present case:

'In pursuance of Article 14(1) of the Convention, the Republic of Austria reserves the right not to accord to a child born out of wedlock, as provided for in Article 9 of the Convention, the same right of succession in the estate of its father and of a member of its father's family, as if it had been born in wedlock.'

¹⁸ ECHR, judgment of 27 November 1987, Series A, No. 127A. The Court consisted of the following Chamber of Judges: Ryssdal (President); Matscher, Pinheiro Farinha, Sir Vincent Evans, Walsh, Bernhardt, De Meyr (Judges).

The applicant was a Tunisian citizen who had been living in Belgium. In July 1981 he was convicted of aggravated theft and sentenced to three years' imprisonment. The judge who presided in the case had, when sitting as the sole member of a chamber of the court, earlier ordered the continuation of the applicant's pre-trial detention and then his committal for trial. The applicant's appeals against his conviction were dismissed and he was subsequently expelled from Belgium.

In his application to the Commission in 1982 Mr Ben Yaacoub complained of an infringement of his right to have his case heard by an 'impartial tribunal' as prescribed by Article 6(1) of the Convention. In its report in May 1985 the Commission concluded by a majority that there had been a breach of that provision and subsequently decided to refer the case to the Court. In September 1987 the Court was informed that a friendly settlement had been agreed between the applicant and the Belgian Government on the following terms:

1. The Government undertook to lift, with effect from 30 August 1992, the effects of the expulsion order against the applicant.
2. Prior to that date, any request for safe-conduct to enable the applicant to enter Belgium would be examined, provided it was based on valid reasons and supported by appropriate evidence.
3. The Government agreed to pay the applicant 100,000 Belgian francs by way of agreed damages.
4. The costs and fees occasioned by the applicant's appeal on points of law in Belgium and the proceedings before the Convention institutions would be refunded in the amount of 200,000 Belgian francs.

In view of the settlement the Government requested the Court to strike the case out of the list, relying on Rule 48(2) of the Rules of the Court, which provides:

When the chamber is informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter, it may, after consulting, if necessary . . . the Delegates of the Commission and the applicant, strike the case out of the list.

Taking formal note of the friendly settlement, the Court observed that neither the applicant nor the Commission had any objection to the course proposed. Moreover, there were no considerations of public policy to indicate that the proceedings should continue. In this respect it noted that the Belgian Court of Cassation had recently reversed its case law on the legal point raised by the applicant.¹⁹ Since it appeared that the problem to which this case gave rise no longer exists in Belgium, the Court agreed to the request to remove the case from its list.

Meaning of 'contestation' and 'civil rights and obligations' in Article 6(1)—right to a 'fair and public' hearing before an 'independent and impartial tribunal' (Article 6(1))—just satisfaction (Article 50)

*Case No.5. H v. Belgium.*²⁰ The Court held by 12 votes to 6 that the inability of a person who had been struck off the barristers' roll to have his application to be

¹⁹ In adopting its new approach the Court of Cassation was urged by the Advocate-General to take into account the judgments of the European Court in the *Piersack* case, Series A, No. 53, and the *De Cubber* case, Series A, No. 86. For comment on these cases see this *Year Book*, 53 (1982), p. 321, and 55 (1984), p. 395.

²⁰ ECHR, judgment of 30 November 1987, Series A, No. 127. This case was decided by the plenary Court.

restored heard by a tribunal satisfying the requirements of Article 6(1) constituted a violation of the Convention. The Court also decided that Belgium must pay the applicant the sum of 250,000 Belgian francs as compensation for non-pecuniary damage and 100,000 francs in respect of his legal costs and expenses.

In 1957 H became a barrister in Belgium. In 1963 the Bar Council (*Conseil de l'Ordre des avocats*) struck him off the roll when it found that he had advised a client to pay him money in order to avoid arrest. The decision to strike H off was confirmed by Belgian courts; however subsequent criminal proceedings against H in 1964 for fraud and unlawfully holding himself out as an *avocat*, and in 1977 for forgery and fraudulent conversion, ended in acquittals.

In 1970 H set up as a legal and tax adviser. He applied to be restored to the barristers' roll in 1980 and in 1981, but on each occasion was unsuccessful, the Bar Council ruling that although more than 10 years had elapsed since his disbarment, there was no exceptional circumstance which would justify cancelling the sanction in accordance with the relevant provision of the Judicial Code. No appeal was possible against these decisions.

In his application to the Commission in 1980 H complained that the procedure before the Bar Council had violated his rights under Article 6(1) of the Convention. In its report in 1985 the Commission expressed the opinion that there had been a violation of this provision because H had not been able to have his case heard by a 'tribunal' as Article 6(1) requires. The Commission then referred the case to the Court.

Article 6(1) provides:

In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

As in the cases on this provision considered earlier, a large part of the argument in the present case was taken up with the question of whether Article 6(1) was applicable. Here the first issue was whether the proceedings before the Bar Council involved a '*contestation*' (dispute) over a right. Referring to the principles set out in its case law, including *Bodén* (Case No. 2), the Court examined the nature of disbarment and the reasons justifying readmission. It noted that the reference to exceptional circumstances in the Judicial Code was capable of being interpreted and applied in a variety of ways, and that previous decisions of the Bar Council had done nothing to clarify the matter. Holding that the applicant could arguably maintain that in Belgian law he had a right to practise as an *avocat* because he had fulfilled the prescribed conditions, the Court decided that although the Bar Council had some discretion, it did have to determine a '*contestation*' concerning a right.

The next question was whether the disputed right was a civil one. A similar issue had been recently considered in *Pudas* (Case No. 1) and in addressing this issue the Court again drew on its previous jurisprudence. Analysing the characteristics of the profession of *avocat* in Belgium, the Court noted that the State regulated the organization and practice of the profession, but held that this did not in itself mean that the right in question was not a civil one. Similarly, *avocats* were by virtue of their work part of the judicial system, but there was no subordination to the

country's courts and the Bar had complete responsibility for its roll and discipline. On the other hand, factors which weighed in favour of the applicability of Article 6 were the independence of the profession and the private law relationship between an *avocat* and his client, the fact that the chambers and clientele of an *avocat* constitute property interests, and finally the point that *avocats* perform numerous important duties, as, for example, advisers, conciliators and arbitrators, which often have no connection with judicial proceedings. In the light of these considerations relating to the profession the Court concluded that the asserted right was indeed a 'civil' right with the result that Article 6(1) was applicable.

The issue of compliance was also one which raised a number of separate points. As no appeal lay against the Bar Council's decisions the Court had to decide whether the Council was an 'independent and impartial tribunal' and whether it gave H a 'fair and public' hearing.

The applicant and the Commission took the view that the Council was not a 'tribunal' because it fulfilled administrative, advisory and regulatory, as well as disciplinary, functions. The Court did not agree. Citing its previous rulings on this point, it held that a 'plurality of powers cannot in itself preclude an institution from being a "tribunal" in respect of some of them'.²¹ It therefore concluded that the Council satisfied this requirement.

The Court similarly accepted that the Council was independent and impartial. Its members were elected by their peers and were answerable only to their consciences. There was no reason to doubt their personal impartiality and it was not necessary to consider its structural impartiality.²²

However, the procedure before the Council was in the Court's view defective. Although H was able to have the assistance of a lawyer and could appear in person when his applications were being considered, it was difficult for him to discover what might be regarded as evidence of exceptional circumstances and thus to argue his case effectively. Moreover 'he had cause to fear that there was some risk of being dealt with arbitrarily, especially as there was no provision allowing him a right of challenge . . . and as the Antwerp Bar did not have any internal rules of procedure'.²³ The lack of procedural safeguards was particularly important in view of the seriousness of what was at stake and the imprecise nature of the concept of 'exceptional circumstances'. Furthermore:

. . . this very lack of precision made it all the more necessary to give sufficient reasons for the two impugned decisions on the issue in question. Yet in the event the decisions merely noted that there were no such circumstances, without explaining why the circumstances relied on by the applicant were not to be regarded as exceptional.²⁴

As to the other requirement of Article 6, the Court pointed out that H's applications were not heard in public, nor were the Bar Council's decisions 'pronounced' in public. In the present case the circumstances were not such as to warrant the hearings' not being held in public, and although the right in question is one which can be waived,²⁵ the evidence did not establish that H had intended to do so and he

²¹ Judgment, para. 50.

²² The issue of structural impartiality was discussed by Judge Thór Vilhjálmsson and Judge De Meyer in their separate opinions.

²³ Judgment, para. 53.

²⁴ Ibid.

²⁵ See the *Albert and Le Compte* case, Series A, No. 58, para. 35, and Merrills, *The Development of International Law by the European Court of Human Rights* (1988), pp. 161-6.

could not be blamed for failing to demand a right which the practice of the Belgian Bars did not recognize and which he had little prospect of securing.

In view of the absence of a public hearing and the deficiencies previously described, the Court concluded that there had been a violation of Article 6(1).

As just satisfaction under Article 50 the applicant claimed very large sums for pecuniary and non-pecuniary damage. The Court rejected the former on the ground that no causal link had been shown between the breach of the Convention and any deterioration in H's financial position. As regards non-pecuniary damage, the Court agreed that compensation was appropriate but awarded a more modest amount. The claim for costs and expenses was also accepted only partially.

The decision that the Convention had been violated here is notable for the way in which the Court emphasized that Article 6(1) has a substantive as well as a procedural aspect. Thus a body which is concerned with 'rights' must function in accordance with ascertainable rules and support its decisions with adequate reasons.²⁶ As far as the applicability of Article 6(1) is concerned, the principles which the Court applied here can be regarded as well established. The decision shows, however, how the application of those principles can divide the Court. The six judges who dissented did so on the ground that since restoration to the barristers' roll was discretionary, the dispute here was not concerned with a right.²⁷ This view, which would limit the scope of the Convention significantly, stands in sharp contrast to the decision of the Court, which has consistently sought to extend the reach of Article 6 with all that this entails.

Just satisfaction (Article 50)—compensation for disguised extradition—costs and expenses.

Case No. 6. Bozano case (Application of Article 50).²⁸ The Court held unanimously that France should pay the applicant 100,000 French francs as compensation and 138,350 francs in respect of legal costs and expenses.

In its judgment on the merits in 1986 the Court held that when Mr Bozano, an Italian national, had been forcibly conveyed from Limoges to the Swiss border in October 1979 he had suffered a deprivation of liberty which was neither 'lawful' within the meaning of Article 5(1) (f) of the Convention, nor compatible with the 'right to security of person'. This was because he had been subjected to what was in effect a disguised form of extradition and not 'detention' necessary in the ordinary course of 'action . . . taken with a view to deportation'.²⁹ The question of just satisfaction under Article 50 was reserved.

Following his removal to Switzerland Mr Bozano had been extradited to Italy and at the time of the current proceedings was on the island of Elba serving a sen-

²⁶ This point received further emphasis in the joint opinion of Judges Lagergren, Pettiti and Macdonald who referred to the development of the principle by the International Court of Justice in its advisory opinion in the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal case*, ICJ Reports, 1973, p. 166.

²⁷ Judges Gölcüklü, Matscher, Sir Vincent Evans, Bernhardt and Gersing delivered a short joint dissenting opinion. Judge Pinheiro Farinha delivered an individual dissenting opinion making the same point.

²⁸ ECHR, judgment of 2 December 1987, Series A, No. 124E. The Court consisted of the following Chamber of Judges: Ryssdal (President); Bindstedler-Robert, Gölcüklü, Pinheiro Farinha, Pettiti, Sir Vincent Evans, Russo (Judges).

²⁹ ECHR, judgment of 18 December 1986, Series A, No. 111, and see this *Year Book*, 58 (1987), p. 460.

tence of life imprisonment passed on him *in absentia* by an Italian court while he was hiding in France. In the present proceedings the applicant sought compensation totalling more than 18,000,000 francs in respect of his detention in France, in Switzerland and in Italy, including the sentence he still had to serve until June 2005, which was the earliest time at which he might be able to leave prison. The Government denied liability in relation to the applicant's detention in Switzerland and Italy and offered him 'nominal compensation' of 1,000 francs in respect of his detention in France.

The Court began by emphasizing the seriousness of the breach committed on French territory. The circumstances, which were a clear abuse of deportation procedure, were such as to have inevitably caused the applicant substantial non-pecuniary damage. The Court noted that it was not presently concerned with the applicant's detention in Switzerland and Italy and would not have to consider them in the future as the Commission had declared his complaints here inadmissible or had struck them out of the list.³⁰ Nevertheless, while the Court agreed with the Government that there could be no question of compensating the applicant for his detention outside France, it held that reference had to be made to Mr Bozano's situation prior to the enforcement of the deportation order.

The competent French court had ruled against Italy's request for extradition. That ruling was binding on the Government but did not preclude it from making a deportation order. Normally, however, the applicant could have challenged a deportation order in the administrative court and applied to the *Conseil d'Etat* for a stay of execution. By waiting more than a month before serving the order, the French police had prevented Mr Bozano from making any effective use of the remedies theoretically available to him. This had therefore prevented him from remaining at liberty in France, at least for a little while. If his appeals against the deportation order had failed, which was not a foregone conclusion, he should have been able to go, under supervision if necessary, to a country other than Switzerland. Even assuming that country had handed him over to Italy, there would at least have been some further delay. The forcible removal of Mr Bozano from Limoges to the Swiss border thus caused him real damage, although this could not be precisely assessed. Reviewing the issue on an equitable basis, the Court awarded the applicant 100,000 francs as compensation for the damage sustained and rejected the rest of his claims.

On the issue of legal costs and expenses the Court accepted the claim put forward by the applicant which was not disputed by the Government. The applicant was therefore awarded his legal costs in full, less the sum received in legal aid from the Council of Europe.

Right to marry (Article 12)—application to temporary prohibition on remarriage—just satisfaction (Article 50)

*Case No.7. F v. Switzerland.*³¹ The Court held by 9 votes to 8 that a judicial order prohibiting the applicant from remarrying for 3 years contravened Article 12

³⁰ On 12 July 1984 the Commission declared Mr Bozano's application against Italy to be inadmissible. On the same day it declared his application against Switzerland to be inadmissible except for one point. On 9 May 1987 the Commission struck what remained of the application out of its list after Mr Bozano had withdrawn his complaint.

³¹ ECHR, judgment of 18 December 1987, Series A, No. 128. This case was decided by the plenary Court.

of the Convention. It also held unanimously that Switzerland must pay the applicant 14,327 Swiss francs in respect of his costs and expenses.

The applicant in this case, one of the most unusual to have come before the Court, was born in 1943 and between 1963 and 1987 married four times. He married his first wife in 1963 and divorced her in 1964; he married his second wife in 1966 when she was expecting his child, but after a separation in 1978 cohabited with another woman and was divorced by his wife in 1981. The domestic court then prohibited the applicant from remarrying for a year under Article 150 of the Swiss Civil Code which reads as follows:

When granting the divorce, the Court shall fix a period of not less than one and not more than two years during which the guilty party shall not be entitled to marry; where the divorce is granted for adultery, this period may be extended to three years . . .

In 1983 the applicant advertised for a secretary. On 11 January Miss N appeared in response to his advertisement. Four days later they were living together and on 26 February she became his third wife. On 11 March, however, the applicant began divorce proceedings and at the beginning of April N left the matrimonial home after F had taken up again with a former mistress. Later in the year a court rejected F's petition for divorce, but allowed his wife's cross petition, and at the same time imposed on F a 3 year prohibition on remarriage, finding that he was solely responsible for the marriage breakdown. An attempt by the applicant to challenge the prohibition through the Swiss courts was unsuccessful. However in 1987, when the 3 years had elapsed, F married his fourth wife who bore him a child one month later.

In his application to the Commission in 1984 F's main submission was that the three year prohibition on his remarriage was incompatible with his right to marry under Article 12 of the Convention. In its report in 1986 the Commission expressed the opinion by 10 votes to 7 that there had been a violation of this provision. The Government and the Commission then referred the case to the Court.

Article 12 of the Convention provides:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Although this provision refers to the regulation of marriage by national law, it is clear from the Court's jurisprudence that 'the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired'.³² On the other hand, the Court has also made it clear that 'in proceedings originating in an individual application, it has to confine its attention, as far as possible, to the issues raised by the concrete case before it'.³³ Thus while the section of the Code prohibiting remarriage had to be reviewed in the present case, the Court's task was not to evaluate the provision *in abstracto*, but to examine the manner in which it had been applied.

The Court noted that waiting periods before marriage used to be required in Austria and the Federal Republic of Germany but have now been abolished and in this connection recalled its often stated precept that the Convention must be interpreted in the light of present day conditions. It added, however, that:

³² *Rees case*, Series A, No. 106, para. 50, and see this *Year Book*, 57 (1986), p. 469.

³³ *Judgment*, para. 31.

. . . the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field—matrimony—which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.³⁴

The Court noted that the contested measure amounted in substance to a civil sanction, but the domestic court was allowed some measure of discretion in its application. In the present case this discretion had been exercised by the Swiss court when it had assessed the applicant's past conduct before imposing the prohibition. In arguing that the prohibition here was neither unreasonable, nor arbitrary, nor disproportionate, the Government had emphasized the importance of protecting the institution of marriage. The Court recognized that the stability of marriage is in the public interest but doubted whether the means employed here were appropriate to that aim. It noted that the repeal of Article 150 had been recommended by two committees of experts and rejected the Government's argument that the temporary prohibition of remarriage was designed to protect the rights of others. On the contrary, the Court suggested that F's fourth wife could consider herself wronged by the measure, which might also have caused their child to have been born out of wedlock.

The Court was not convinced either by the argument that compelling a person to take time for reflection might protect him from himself and rejected the further submission that remarriage subsequent to a divorce cannot be equated with a first marriage, observing that 'If national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons the right to remarry without unreasonable restrictions'.³⁵

The Government's final argument was that judicial separation and certain other measures have consequences for those concerned which are identical to those of a temporary prohibition on remarriage. The Court considered, however, that these situations were not comparable and so concluded by a narrow majority that there had been a violation of Article 12.

The issue of just satisfaction under Article 50 was soon dealt with. The applicant asked for an order directing Switzerland to amend the Civil Code, but the Court rejected this as beyond its jurisdiction. The applicant did not claim to have suffered pecuniary damage and the Court decided that any non-pecuniary damage was satisfied by the judgment. Finally, the applicant sought a sum for costs and expenses which the Government did not dispute. This part of the claim was therefore accepted.

This is only the third case in which the Court has considered the right to marry and although the particular issue is unlikely to recur, the decision contains a number of points of interest. As regards the scope of Article 12, the case confirms that the right to marry covers both marriage and remarriage, which is not unexpected since the Convention makes no distinction between them. With reference to the application of the Convention generally, the case is to be classed with those like *Inze* (Case No. 3) in which the Court decides that local arrangements have fallen too far behind European standards, rather than cases such as *Müller* (Case No. 12)

³⁴ Ibid., para. 33.

³⁵ Ibid., para. 38. The point that permitting divorce is not a requirement of the Convention was established in the *Johnston* case, Series A, No. 112, and see this *Year Book*, 58 (1987), p. 463.

in which it recognizes the scope for national variations. The eight members of the Court who dissented maintained that the broad reference to 'national laws' in Article 12 means that there is more room for diversity in relation to the right to marry than elsewhere in the Convention. This is a persuasive view. While the Court is now confident enough to reject national laws which it regards as out of date, it does not follow that it is always appropriate for it to do so.

Right to liberty (Article 5(1))—the concept of lawfulness in Article 5(1)(d)—right to take proceedings to challenge the lawfulness of detention (Article 5(4))—non-discrimination (Article 14)

*Case No. 8. Bouamar case.*³⁶ In this case, which concerned the detention of a juvenile in Belgium, the Court held unanimously that a series of placements in a remand prison constituted a breach of the applicant's rights under Article 5(1) of the Convention. The Court also held by 6 votes to 1 that there had been a breach of Article 5(4), but unanimously rejected a claim based on Article 14 taken in conjunction with that provision. The question of just satisfaction was reserved.

The applicant, who suffered from a disturbed personality and was a minor at the time of the events complained of, spent from June 1977 to May 1978 in various juvenile homes in Belgium as a preventive welfare measure authorized by the Children's and Young Persons' Welfare Act of 1965. In 1979 he was brought before the Liège juvenile court with a view to the imposition of one of the custodial, protective or educative measures available under the above-mentioned Act. In 1980 the juvenile courts ordered a succession of interim measures, including nine placements in a remand prison for a maximum period of 15 days each. The measures were taken under the emergency procedure provided for in Section 53 of the Act and were ordered because it was impossible to find an individual or an institution which could accept Mr Bouamar immediately, and on account of his dangerous behaviour. In the periods between the remand placements the juvenile courts varied their orders and either returned the applicant to his family or sent him to a State reformatory. Attempts to challenge the lawfulness of some of these decisions in the Belgian courts were unsuccessful.

In his application to the Commission in 1980 Mr Bouamar complained that his treatment had violated a number of provisions of the Convention. In its report in July 1986 the Commission expressed the unanimous opinion that there had been violations of Article 5(1) and Article 5(4), but no violation of Article 14 taken in conjunction with Article 5(4), and considered that no separate issue arose under Article 13. The Commission then referred the case to the Court.

Article 5(1) of the Convention provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.

The Government's main argument was that the applicant had been detained 'for

³⁶ ECHR, judgment of 29 February 1988, Series A, No. 129. The Court consisted of the following Chamber of Judges: Ryssdal (President); Thór Vilhjálmsson, Walsh, Sir Vincent Evans, Macdonald, Russo, De Meyer (Judges).

the purpose of educational supervision'.³⁷ The question the Court had to decide was whether the disputed placements were lawful.

The Court's case law indicates that 'lawfulness' must be understood as requiring not only compliance with domestic law but also that 'any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness'.³⁸ Thus although Mr Bouamar had been detained in conformity with the relevant legislation, this was not enough. The Court also had to look at the content of the domestic law and examine the way in which it had been applied.

The Court recognized that the Belgian legislation was intended to deal with juvenile delinquency in a liberal spirit. Designed to avoid as far as possible any deprivation of liberty of juveniles, the Act of 1965 authorized their detention only in the cases exhaustively listed in it. Although there was some controversy over the scope of Section 53 in Belgium, the Court held that there was no unlawfulness in the present case with regard to compliance with domestic law.

On the issue of arbitrariness, the Court noted that the applicant was shuttled to and fro between the remand prison and his family without this being followed by the actual application of a regime of educational supervision in a setting designed for this purpose. Indeed, at the time of the events in issue Belgium had no institutions which were appropriate to fulfil the objectives of the 1965 Act. The Court therefore concluded that the fruitless series of nine placement orders, which did not further any educational aim, could not be considered to be compatible with Article 5(1)(d).

Mr Bouamar's other principal claim concerned Article 5(4) which provides:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The Government's submission here was that the review required by Article 5(4) was incorporated in the procedure followed before the Juvenile Court. That body was undoubtedly a 'court' from the organizational point of view; however, as the European Court noted, it is clear from the case law on this provision that to satisfy Article 5(4) a body must employ a procedure with both a judicial character and adequate guarantees for the individual.³⁹

Applying this test, the Court found that whilst the procedure before the Juvenile Court featured certain guarantees, it had not been established that counsel for the applicant was present at the hearings which preceded placement, nor that he had access to all the documents in the file. The mere fact that Mr Bouamar, who was very young at the time, appeared in person before the domestic court was not enough to afford him the necessary safeguards.

The Court also found that the available remedies were not compatible with the requirements of Article 5(4). The proceedings which were taken in the juvenile courts with a view to revising the original orders took place in the absence of the applicant's lawyer. As to the subsequent appeals, these were all rejected, with the result that the competent courts were unable to decide speedily on the lawfulness of

³⁷ Alternative submissions by the Government relating to Article 5(1)(b) and the second part of Article 5(1)(d) were considered but dismissed.

³⁸ Judgment, para. 47.

³⁹ This principle was laid down in the *Winterwerp* case, Series A, No. 33, and see this *Year Book*, 50 (1979), p. 267.

the applicant's deprivation of liberty. There had consequently been a breach of Article 5(4).

Further claims based on Article 13 (requirement of an effective remedy before a national authority) and Article 14 (non-discrimination) were dealt with summarily. As regards the first of these provisions, the Court, like the Commission, found that it need not be considered. On the discrimination issue the applicant pointed out that adults held in custody pending trial in Belgian law enjoyed a speedy judicial review of the lawfulness of their detention which was not available to juveniles. In the Court's view, however, the protective nature of the procedure applied to juveniles provided an objective and reasonable justification for the difference of treatment.

The question of just satisfaction was reserved and, as Case No. 23, is described below.

This decision was an application of some of the most firmly established principles in the Court's jurisprudence. *Pauwels* (Case No. 14) was the other decision on the right to liberty in the period under review and shows a different side of Article 5.

Right to respect for family life (Article 8)—application to care proceedings—the meaning of 'in accordance with the law' and 'necessary in a democratic society' in Article 8(2)—just satisfaction (Article 50)

*Case No. 9. Olsson case.*⁴⁰ In this case, which concerned Sweden, the Court held by 10 votes to 5 that there had been no violation of Article 8 of the Convention when the applicants' children were taken into care and the applicants' subsequent requests for termination of care were refused. However, the Court also held by 12 votes to 3 that the manner in which the care decision was implemented had violated Article 8. Finally, the Court held unanimously that Sweden must pay the applicants 200,000 Swedish crowns as just satisfaction for non-pecuniary damage, together with 150,000 crowns for legal fees and expenses.

The applicants, who lived in Gothenburg, had three children, Stefan, Helena and Thomas, who were taken into care in 1980 by the local Social District Council, following a social report which concluded that the children's development was in danger because their parents had demonstrated an inability to satisfy their need for care, stimulation and supervision.⁴¹ The decision to take the children into care was subsequently confirmed by the County Administrative Court and an appeal against this decision was unsuccessful. In June 1982 the Council rejected the applicants' request for termination of the public care and subsequent appeals and requests were likewise unsuccessful. In 1987, however, the Swedish courts directed the termination of the care as regards all three children.

Following the care decision of 1980:

- (a) Stefan was placed in an educational home in Gothenburg run by the Board for the Retarded and, after a while, in a foster home about 100 kilometres from the applicants' home in Gothenburg. He stayed there for more than 2

⁴⁰ ECHR, judgment of 24 March 1988, Series A, No. 130. This case was decided by the plenary Court.

⁴¹ The full text of this report is reproduced in para. 12 of the judgment.

years and was then moved to a children's home, run by the same Board, about 80 kilometres to the north of Gothenburg.

- (b) Helena and Thomas were placed in separate foster homes, at localities situated about 100 kilometres from each other and approximately 600 kilometres to the north-east of Gothenburg.

Various restrictions were placed on the applicants' access to the children whilst they were in care.

Stefan is now reunited with his parents. In June 1987, however, the Council prohibited them until further notice from removing Helena and Thomas from their foster homes; an appeal by the applicants concerning this decision was pending in November 1987.

In their applications to the Commission in 1983 Mr and Mrs Olsson maintained that they were the victims of violations of a number of articles of the Convention. In its report in December 1986 the Commission expressed the opinion by 8 votes to 5 that the care decisions concerning the applicants' children, in combination with their placement in separate and distant foster homes, constituted a violation of the right to respect for family life guaranteed by Article 8. The applicants' other complaints were rejected. The Commission and the Government then referred the case to the Court.

Article 8, which was the focus of the argument in this case, provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In their submissions to the Court the applicants alleged violations of their right to respect for their family life by reason of the care decision, the manner of its implementation and the various refusals to terminate the public care of their children.

The Court found that the measures in issue constituted interferences with the right for the purposes of Article 8(1), but had the legitimate aim of protecting health or morals and the rights and freedoms of others, namely the children. On the question of whether the interferences were 'in accordance with the law' the Court referred to its extensive jurisprudence on the meaning of this phrase⁴² and held that although the Swedish legislation was rather general in its terms and conferred a wide discretion on the authorities, regard must be had to the subject-matter of the law and its extensive safeguards against arbitrary interference. Taking these into account, the Court held that the legislation in question was sufficiently precise to satisfy the Convention.

The main issue was whether the interferences were 'necessary in a democratic society'. Here the Court made the important point that its case law, which is again extensive,⁴³ demonstrated that its review was not limited to ascertaining whether the State had acted reasonably, carefully and in good faith. For 'in exercising its supervisory jurisdiction, the Court cannot confine itself to considering the

⁴² For a recent example see the *Gillow* case, Series A, No. 109, and this *Year Book*, 58 (1987), p. 455.

⁴³ See, for example, the *Lingens* case, Series A, No. 103, and this *Year Book*, 57 (1986), p. 464.

impugned decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced to justify the interferences at issue are "relevant and sufficient"'.⁴⁴

Looking first at the decision to take the children into public care and the subsequent refusals to terminate care, the Court noted that the applicants had been sufficiently involved in the decision-making process to fulfil the procedural requirements of Article 8. As far as the substance of these decisions was concerned, they had been based on social reports supported by statements from persons well acquainted with the background. They had, moreover, been confirmed by courts which had been able to form their own impression at the hearings and whose judgments had been confirmed on appeal. In these circumstances the Court was satisfied that the Swedish authorities had been reasonably entitled, having regard to their margin of appreciation, to think both that it was necessary to take the children into care and that this decision should remain in force. The Court therefore decided that there had been no violation of Article 8 as regards these two points.

It came to a different conclusion when it turned to the measures which had been taken to implement the care decision. Although the Court rejected the applicants' argument that the quality of care arranged for the children had been unsatisfactory, it found that the separation of the children, the placement of Helena and Thomas at long distances from their parents' home and the restrictions on visits, had impeded easy and regular access by the members of the family to each other and ran counter to the ultimate aim of family reunification. In these respects the measures in question 'were not supported by "sufficient" reasons justifying them as proportionate to the legitimate aim pursued'.⁴⁵ In the Court's view they were therefore not 'necessary in a democratic society' and so in this respect there had been a violation of Article 8.

The applicants' various other claims were briefly considered, but the Court, like the Commission, rejected them all. The claim that they had suffered 'inhuman treatment' contrary to Article 3 was rejected on the facts, as were the claims that they had not received a 'fair hearing' in accordance with Article 6, that they had been discriminated against on grounds of social origin contrary to Article 14, that they had been unable to ensure education for their children in conformity with their religious and philosophical convictions as required by Article 2 of Protocol No. 1, and that they had been denied an effective remedy before a national authority as required by Article 13. Thus the only violation found was the limited infringement of Article 8 already mentioned.

Because the Court had rejected the majority of the applicants' claims the question of just satisfaction presented no special difficulty. The applicants claimed 30,000,000 Swedish crowns for non-pecuniary damage, together with the sum of 884,500 crowns for costs and expenses. In view of its finding on Article 8, however, the Court observed that the applicants were not entitled to compensation for the care decision and the removal of the children as such, but only for the prejudice suffered as a result of the improper means of implementation. As the Court found that the latter had caused the applicants considerable inconvenience, anxiety and distress, it decided that they were entitled on an equitable basis to 200,000 crowns under this head. As far as the claim for costs and expenses was concerned, the

⁴⁴ Judgment, para. 68.

⁴⁵ *Ibid.*, para. 83.

Court found that certain sums related to matters outside the scope of the case, while other claims were either unnecessary or excessive. Again making its assessment on an equitable basis, it awarded the applicants less than a quarter of their claim under this head.

The present case was one of four involving Article 8 in the period under review⁴⁶ and turned out to be the most controversial. Whereas five members of the Court considered that the decisions relating to the children, as well as their implementation, had unjustifiably interfered with the right to respect for family life, three judges took the view that there had been no violation at all of the Convention. Those who would have found for the applicants on wider grounds did so not because they disagreed with the domestic decisions, but because they believed that it is wrong to take children away from their parents without a prior judicial decision, except in cases of emergency.⁴⁷ The Court was not prepared to go so far, but its scrutiny of the facts shows that justifying the authorities' decisions in cases of this type is by no means a formality. The judges who would have exonerated the respondent completely considered that the Court had placed too little weight on the applicants' attitude and the practical difficulties of arranging children's placement,⁴⁸ factors on which it is clear from this case that more than one view can be taken.

In rather similar cases involving the United Kingdom in 1987 the Court drew attention to the procedural requirements which must be satisfied when care proceedings are challenged under the Convention.⁴⁹ With the demonstration in this latest case that the merits of decisions relating to care can also be investigated, more cases on this thorny issue can surely be anticipated.

Right to respect for correspondence (Article 8)—right to an effective remedy before a national authority (Article 13)—just satisfaction (Article 50)

*Case No. 10. Boyle and Rice case.*⁵⁰ In this case, which concerned prisoners' rights in the United Kingdom, the Court held unanimously that there had been a violation of Article 8 of the Convention as regards a claim relating to one of the applicants' correspondence. Several other claims were rejected. The Court also decided that the successful applicant should be awarded £3,000, to be increased by any value added tax which might be chargeable, in respect of his costs and expenses.

The four applicants in this case were a husband and wife, James and Sarah Boyle, and a father and son, John and Brian Rice. In 1967 James Boyle and Brian Rice were sentenced to life imprisonment for murder and served part of their sentences at Saughton Prison, Edinburgh. The applicants' complaints were all directed at the regime applicable in the prison. James and Sarah Boyle's complaints were that:

- (a) the postage of only one three-page letter per week was paid for out of public

⁴⁶ See Cases Nos. 10, 20 and 21 below.

⁴⁷ See the separate opinion of Judges Pinheiro Farinha, Pettiti, Walsh, Russo and De Meyer.

⁴⁸ See the joint partly dissenting opinion of Judges Ryssdal, Thór Vilhjálmsson and Gölcüklü.

⁴⁹ See *O, H, W, B and R v. United Kingdom*, Series A, Nos. 120 and 121, and see this *Year Book*, 58 (1987), p. 484. The Court's applications of Article 50 in these proceedings are Cases Nos. 15, 16, 17, 18 and 19 below.

⁵⁰ ECHR, judgment of 27 April 1988, Series A, No. 131. This case was decided by the plenary Court.

- funds. The postage of other letters could be paid for out of prison earnings of £1.60 per week but not out of prisoners' general financial resources;
- (b) the correspondence between James and Sarah Boyle was controlled by the prison authorities in accordance with the normal practice including, so Mr and Mrs Boyle asserted, the reading aloud, in front of other inmates, of letters written by Sarah Boyle to James Boyle;
 - (c) in July 1981, a letter written by Mr Boyle to a friend of his, Mr Peter McDougall, was stopped by the Prison Governor on the ground that Mr McDougall was a 'media personality';
 - (d) in accordance with the normal rules, Mr Boyle was permitted only one hour's visiting time a month. Because he saw his wife during this time, he was not able to see other members of his family.

Mr Boyle also complained that he had been treated less favourably in Saughton Prison than at a previous establishment.

Brian and John Rice's complaints were that:

- (a) Brian Rice had been refused compassionate leave to visit John Rice who was ill;
- (b) Brian Rice was entitled to only twelve prison visits a year;
- (c) various letters had been either delayed or stopped by the prison authorities.

In their applications to the Commission in 1981 and 1982 both pairs of applicants relied on Article 8 and Article 13 of the Convention. In its report in May 1986 the Commission expressed the opinion that:

- (a) the stopping of Mr Boyle's letter to Mr McDougall was in breach of Article 8;
- (b) there had been a breach of Article 13 concerning limited prison visiting entitlement and the refusal to grant Brian Rice compassionate leave to visit his sick father;
- (c) there had been no breach of Article 13 in respect of any of the applicants' other complaints.

The Commission then referred the case to the Court.

The main issue in this case concerned the interpretation and application of Article 13 of the Convention which provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In its previous case law the Court has declined to interpret this provision literally and has held that it is not necessary to show that some other provision has been violated before an applicant can rely on Article 13. On the other hand, it has also held that it does not 'require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention'.⁵¹ In the present case the Court prefaced its examination of the applicants' complaints by confirming these principles and adding an important comment relating to the role of the Commission.

⁵¹ Judgment, para. 52.

The Government maintained that a claim which has been declared manifestly ill-founded by the Commission cannot be regarded as 'arguable' for the purposes of Article 13. The Court, however, did not agree. Whilst it accepted that it cannot review complaints which have been rejected as inadmissible, the Court pointed out that when any case is referred to it under Article 13 it is 'competent to take cognisance of all questions of fact and of law arising in the context of the complaints before it under Article 13 . . . including the arguability or not of the claims of violation of the substantive provision'.⁵² Thus although the Commission's decision on admissibility would provide 'significant pointers' to the arguable character of the claims, the Court would not, as the Government suggested, treat them as decisive.

Having established the framework for its application of Article 13, the Court considered the individual claims and in each instance found that they must be rejected. Mr and Mrs Boyle's complaint regarding letter postage had been rejected by the Commission as manifestly ill-founded for the purposes of Article 8, and the Court agreed that it was not arguable under Article 13. This was also true of Mr Brian Rice's complaint concerning the posting of letters, which had not been substantiated, and the control of the Boyles' correspondence, which the Court found was in accordance with the Convention. In respect of the complaints relating to visits and leave, on the other hand, the Court found either that a domestic remedy was available, or, as with the complaint about correspondence, that the limitations imposed were within the authorities' discretion. Its conclusion was therefore that in no case had there been a violation of the Convention.

The other issue, which concerned only Mr Boyle, was whether the stopping of his letter to Mr McDougall amounted to an unjustified interference with 'the right to respect for . . . correspondence', which is guaranteed by Article 8. The Government admitted that it did, explaining that the rule under which the letter was stopped had been applied in error. In view of this the Court agreed with the Commission and held that there had been a breach of Article 8.

In the light of the Court's findings the issue of just satisfaction under Article 50 was a simple one. The sole aspect of the case on which the Court had found a violation was the uncontested claim under Article 8, and here no claim for compensation had been made. The Court therefore decided that no costs or expenses were recoverable by John and Brian Rice and only a proportion of those incurred in connection with the representation of James and Sarah Boyle. Making an assessment on an equitable basis, it held that Mr Boyle should be awarded £3,000 plus VAT.

This was the most important case involving the United Kingdom to be decided in the period under review.⁵³ It is not the first to raise the issue of prisoners' rights⁵⁴ and, although significant changes have been made in the Prison Rules as a result of previous cases, it is unlikely to be the last. As regards the law of the Convention the case confirms that Article 13 covers only 'arguable' grievances, and suggests that the Court intends to discourage complaints without merit under one of the substantive articles from resurfacing as claims under Article 13. Further consideration of this provision will be found in *Plattform 'Ärzte für das Leben'* (Case No. 22).

⁵² Ibid., para. 54, emphasis added.

⁵³ The others were all concerned only with the application of Article 50: see Cases Nos. 15, 16, 17, 18 and 19 below.

⁵⁴ See, for example, *Campbell and Fell*, Series A, No. 80, and see this *Year Book*, 55 (1984), p. 381.

Right to a hearing before an 'independent and impartial tribunal' (Article 6(1))—nature and effect of an 'interpretative declaration'—reservations (Article 64)—just satisfaction (Article 50)

*Case No. 11. Belilos case.*⁵⁵ In this case, which raised the question of the effect of an interpretative declaration to the Convention, the Court held unanimously that Switzerland had violated its obligations under Article 6(1) because the applicant's case had not been heard by an 'independent and impartial' tribunal as that article requires. The Court also held that the respondent must pay the applicant the sum of 11,750 Swiss francs, less the sum received as legal aid, in respect of her legal costs and expenses.

In May 1981 the applicant, Mrs Belilos, was fined 200 Swiss francs for taking part in an unauthorized demonstration in the city of Lausanne. The fine was imposed by a body called the Lausanne Police Board which subsequently reduced the fine but confirmed the conviction. The applicant exercised her right to appeal on points of law, but this appeal was rejected by a Court of Criminal Cassation in November 1981 and a subsequent public-law appeal was rejected by the Federal Court in 1982.

In her application to the Commission in 1983 Mrs Belilos complained that the proceedings before the Police Board had failed to provide her with a hearing by a 'tribunal' which was 'independent and impartial' within the meaning of Article 6(1) of the Convention. In its report in May 1986 the Commission expressed the unanimous opinion that there had been a violation of this provision. The Commission and the Government then referred the case to the Court.

The relevant part of Article 6(1) provides:

In the determination of . . . any criminal charge . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law.

Before it could consider whether these requirements had been satisfied, the Court first had to consider a preliminary objection in which the Government invoked an interpretative declaration to Article 6(1) which Switzerland had made when it ratified the Convention in 1974. The Declaration was as follows:

The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.

The Government argued that this was a 'qualified' interpretative declaration, in the nature of a reservation within the meaning of Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties.⁵⁶ The applicant, on the other hand, maintained that it was a mere interpretative declaration and as such had no effect on Switzerland's obligations. The Commission supported the applicant and when dealing with the substantive issue had therefore ignored the declaration. The

⁵⁵ ECHR, judgment of 29 April 1988, Series A, No. 132. This case was decided by the plenary Court.

⁵⁶ Article 2(1)(d) of the Vienna Convention provides:

' "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.'

Court, however, agreed with the Government on this point and ruled that despite its title, the 'declaration' must be treated as a reservation.

In drawing this conclusion the Court rejected a number of the Government's arguments, but agreed that the preparatory work of the declaration showed that the Swiss Government had always been concerned to avoid the consequences which a broad view of the right of access to the courts would have for the judicial and administrative system in the cantons. To determine the legal character of a declaration the Court said that it was necessary to 'look behind the title given to it and determine its substantive content'.⁵⁷ Since it was clear in the present case that Switzerland had intended to remove certain categories of proceedings from the ambit of Article 6(1), the Court decided that the declaration must be regarded as a reservation.

The decision that by making the declaration Switzerland had intended to limit its obligations was not the end of the matter. For having established that the declaration was in effect a reservation, the Court now had to decide whether it satisfied the criteria laid down by Article 64 of the Convention which provides:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

On the question of whether the declaration contravened Article 64(1) because it was 'of a general character' the Government maintained that it did not, because if account was taken of its language and the circumstances in which it had been devised, the scope of the declaration could be readily ascertained. The Court disagreed. Supporting the Commission's view on this point, it said:

By 'reservation of a general character' in Article 64 is meant in particular a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope. While the preparatory work and the Government's explanations clearly show what the respondent State's concern was at the time of ratification, they cannot obscure the objective reality of the actual wording of the declaration. The words 'ultimate control by the judiciary over the acts or decisions of the public authorities relating to [civil] rights or obligations or the determination of [a criminal] charge' do not make it possible for the scope of the undertaking by Switzerland to be ascertained exactly, in particular as to which categories of dispute are included and as to whether or not the 'ultimate control by the judiciary' takes in the facts of the case. They can therefore be interpreted in different ways, whereas Article 64 paragraph 1 requires precision and clarity. In short, they fall foul of the rule that reservations must not be of a general character.⁵⁸

The Court decided that because the declaration contained no reference to national law, it also failed to satisfy Article 64(2). The Government had drawn attention to the difficulties which this requirement presents for federal States, but the Court found this consideration unpersuasive. Explaining that Article 64(2) applies to all States whether they are unitary or federal and whether or not they have a unified body of procedural law, it held that the 'brief statement of the law

⁵⁷ Judgment, para. 49.

⁵⁸ *Ibid.*, para. 55.

concerned' is both an evidential factor and a contribution to legal certainty. Its omission could therefore not be justified, even by formidable practical problems. The interpretative declaration was not accompanied by such a statement, and so it was not in accordance with the Convention.

The result of this exhaustive analysis of the effect of the declaration was that the Court, like the Commission, concluded that the respondent's obligations under the Convention had not been modified.⁵⁹ Since it was clear that Article 6(1) was applicable, the Court could now proceed to the substantive point.

The Lausanne Police Board whose character was in issue has been described in Swiss law as both a 'municipal authority' and an 'administrative authority'. The Court held that even if these terms were not decisive, they provided an important indication as to the nature of the body in question. The Board, which consisted of a single police official, had a judicial function and the proceedings before it were conducted in such a way that the accused could present his or her defence. Although its single member was appointed by the municipality, that was not sufficient in itself to cast doubt on his independence and impartiality. He was a municipal civil servant but he sat in a personal capacity, was not subject to orders when exercising his powers and could not be dismissed during his term of office. Moreover, his personal impartiality had not been called into question in the present case.

The Court pointed out, however, that various factors relating to the functions and internal organization of the Board were also important. In Lausanne the member of the Police Board was a civil servant who was liable to return to other duties. The ordinary citizen would tend to see him as a member of the police force, subordinate to his superiors and loyal to his colleagues. Appearances were important and the applicant could legitimately have doubts as to the independence and organizational impartiality of the Police Board. Accordingly, the Board did not satisfy the requirements of Article 6(1). Examining the available forms of appeal, the Court found that these were not sufficient to remedy the deficiencies identified in the proceedings at first instance. It therefore concluded that there had been a violation of Article 6(1).

As just satisfaction under Article 50 Mrs Belilos sought cancellation and refund of the fine which had been imposed on her, together with amendment of the legislation which gave the Police Board jurisdiction to impose fines. The Court rejected these requests as beyond its jurisdiction. It did, however, award the applicant reimbursement of her costs and expenses in the proceedings before the national courts and the Strasbourg institutions, less the 8,822 French francs which she had received in legal aid.

The decision on the merits in this case is an application of the well-established principle that bodies which exercise judicial powers must be independent and impartial in appearance as well as in fact⁶⁰ and needs no further comment. The interest of the case is to be found in the Court's treatment of the various issues raised by interpretative declarations, which have not previously been considered. The ruling that the effect of an instrument depends on its substance rather than its form finds support in Article 2 of the Vienna Convention and judicial practice else-

⁵⁹ As the Court noted, Switzerland was, and regarded itself as, bound by the Convention irrespective of the validity of the declaration.

⁶⁰ For an earlier case on this principle see the *De Cubber* case, Series A, No. 86, and see this *Year Book*, 55 (1984), p. 395.

where⁶¹ and was, it is suggested, here correctly applied to the facts. The application of Article 64, though stricter in some respects than previous Strasbourg practice,⁶² can likewise be justified. If certain interpretative declarations are to be treated as reservations, with all that that implies, it seems reasonable to interpret the requirements of Article 64 stringently so as to protect the integrity of the Convention.

Right to freedom of expression (Article 10)—application to artistic expression—the meaning of ‘prescribed by law’ and ‘necessary in a democratic society’ in Article 10(2)—the margin of appreciation

*Case No. 12 Müller and others case.*⁶³ In this case, which concerned the punishment of obscenity in Switzerland, the Court decided that neither the applicants' conviction and fine for exhibiting obscene paintings, nor the confiscation of the offending works, violated Article 10 of the Convention.

The applicants in this case were nine individuals who had organized an exhibition of contemporary art in Fribourg and Mr Josef Müller, a Swiss artist, who was invited to take part and submitted three paintings completed on the spot and entitled 'Three nights, three pictures'. In September 1981, soon after the exhibition began, Mr Müller's pictures, which showed people and animals engaged in various forms of sexual activity, were removed by the authorities on grounds of obscenity.⁶⁴ In February 1982 all the applicants were convicted of obscenity by the local criminal court and fined and the paintings were confiscated. Appeals against these decisions were dismissed, although in 1988, following an application to the court by Mr Müller, the paintings were returned to the artist.

In their application to the Commission, which was lodged in 1983 and declared admissible in 1985, the applicants maintained that Switzerland had violated its obligations under Article 10 of the Convention. In its report in October 1986 the Commission concluded that there had been no breach of an Article 10 as regards the criminal conviction, but that there had been a violation as regards the confiscation of the paintings. The Commission and the respondent State then referred the case to the Court.

Article 10 of the Convention provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

⁶¹ In the *Anglo-French Continental Shelf* arbitration (1977) the British argument that one of the French 'reservations' to Article 6 of the 1958 Geneva Convention on the Continental Shelf should be regarded as a mere interpretative declaration was rejected on the ground that it imposed a condition on the French acceptance of the delimitation regime. See Merrills, *California Western International Law Journal*, 10 (1980), pp. 324–5, and Bowett, *this Year Book*, 48 (1976–7), p. 91 n. 1.

⁶² In relation to Article 64(1) the Government relied on the criteria laid down by the Commission in the *Temeltasch* case and in relation to Article 64(2) drew attention to Ireland's reservation to Article 6(3)(c) and Malta's interpretative declaration on Article 6(2), neither of which referred to the provisions of domestic law. For discussion of the *Temeltasch* case see Imbert, *International and Comparative Law Quarterly*, 33 (1984), p. 558.

⁶³ ECHR, judgment of 24 May 1988, Series A, No. 133. The Court consisted of the following Chamber of Judges: Ryssdal (President); Cremona, Bindschedler-Robert, Sir Vincent Evans, Bernhardt, Spielmann, De Meyer (Judges).

⁶⁴ A detailed description of one of the offending paintings will be found in para. 16 of the judgment.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of . . . morals, for the protection of the . . . rights of others . . .

Although this provision does not specify that freedom of artistic expression comes within its ambit, the respondent conceded, and the Court agreed, that Article 10 'includes freedom of artistic expression—notably within freedom to receive and impart information and ideas—which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds'.⁶⁵ This being so, the question was whether the interferences which the applicants had suffered in the exercise of their right to freedom of expression, namely their conviction and the confiscation of the paintings, could be justified under Article 10(2).

Dealing firstly with their conviction, the Court rejected the applicants' submission that the relevant legislation was so vague that their punishment could not be said to be 'prescribed by law'. Although the law in question referred simply to publications which were 'obscene' without further elaboration, the Court reiterated the point it had recently made in *Olsson* (Case No.9) that the need for flexibility may compel the use of more or less vague terminology, and held that criminal law provisions on obscenity fall within this category.⁶⁶

The Government argued that the interference complained of had a legitimate aim because its purpose was to protect morals and the rights of others. The Court agreed and so the crucial issue, as in so many of the cases concerning the Convention's qualifying provisions, was whether the disputed interference was 'necessary in a democratic society' for the achievement of that aim. In the applicants' view it was not, because freedom of artistic expression is of such fundamental importance that banning a work of art, or convicting the artist, strikes at the very essence of the right guaranteed by Article 10 and in itself damages a democratic society. In the Government's view, on the other hand, the interference was necessary in view of the subject-matter of the paintings and the circumstances in which they had been exhibited.

The Court agreed with the applicants that 'freedom of artistic expression . . . constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual'.⁶⁷ Recalling its observations in the *Handyside* case,⁶⁸ the Court pointed out that freedom of expression 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.'⁶⁹ Thus 'Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions

⁶⁵ Judgment, para. 27. For an alternative way of reaching this conclusion see the separate opinion of Judge De Meyer, Part I.

⁶⁶ The Court noted also that case law relating to the issue of obscenity had clarified the scope of the legislation to some extent.

⁶⁷ Judgment, para. 33.

⁶⁸ ECHR, judgment of 7 December 1976, Series A, No. 24, and see this *Year Book*, 48 (1976-7), p. 381.

⁶⁹ Judgment, para. 33.

which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression'.⁷⁰

If this ringing affirmation of the value of artistic freedom had perhaps raised the applicants' expectations, they were soon to be disappointed. For, having drawn on its previous jurisprudence to illuminate Article 10(1), the Court adopted the same approach towards Article 10(2). Referring again to *Handyside*, the Court held that:

... it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.⁷¹

On the particular facts, the Court noted that the paintings in question, which it had itself examined,⁷² were crude and displayed in a way which gave the public free access as the organizers of the exhibition had imposed no charge or age-limit for admission. While the Court recognised that conceptions of sexual morality had undoubtedly changed in recent years, it found that the Swiss courts had not acted unreasonably in deciding that the paintings were 'liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity'.⁷³ In the circumstances, and having regard to the margin of appreciation, they were entitled to consider it necessary for the protection of morals to fine the applicants for publishing obscene material. The Court therefore concluded by 6 votes to 1 that there had been no violation of Article 10 in this respect.

The other issue in the case, the confiscation of the paintings, may be dealt with more briefly. The legislation under which the Swiss court acted authorized destruction of an offending item, but made no reference to confiscation. Case law, however, indicated that the provision in question can be satisfied by confiscation where this is more appropriate, and in view of these decisions the Court decided that the seizure of Mr Müller's work was 'prescribed by law', as Article 10(2) requires. The seizure also had a legitimate aim because it was designed to protect public morals by preventing any repetition of the offence.

As regards the 'necessity' for the seizure, which here, as on the previous point, was the vital issue, the Court held that the considerations which justified the conviction also applied to the confiscation. It recognized that in relation to an original work of art a particular problem arose because confiscation meant that the artist could no longer make use of his work. Here, however, the Court attached importance to case law establishing that the owner of a confiscated work may apply to the relevant cantonal court to have the order discharged or varied in circumstances where this is appropriate. This procedure had in fact been used by the artist to recover his property. While it was true that he had been deprived of his works for nearly eight years, the Court pointed out that he could have applied for their return

⁷⁰ Ibid.

⁷¹ Ibid., para. 35.

⁷² Following the Court's decision to inspect the offending paintings, they were shown *in camera* on 25 January 1988, in the presence of those appearing before the Court before the hearing began.

⁷³ Judgment, para. 36.

earlier and was actually reminded of this possibility at the hearing before the Commission in 1985. This being so, and having regard again to their margin of appreciation, the Swiss courts were entitled to hold that the confiscation of the paintings was necessary for the protection of morals. The Court accordingly concluded by 5 votes to 2 that there had been no violation of Article 10 in this respect either.⁷⁴

This is the first case in which the Court has had to consider the relevance of the Convention to the graphic arts. Its decision that artistic expression is covered by Article 10 is clearly correct and supported by the corresponding provision of the International Covenant on Civil and Political Rights.⁷⁵ The conclusion that, although the Convention is applicable in this kind of case, it had not been violated confirms its earlier, and it is suggested justifiable, view that in moral matters there is room for a significant margin of appreciation. However, the special features of this case deserve close attention. If access to the exhibition had been limited, or Mr Müller had not had the opportunity to retrieve his confiscated paintings, the Court's treatment of the two main issues in the case might well have been different. Thus although the Court rejected the idea of unlimited artistic freedom, it emphasized that on this, as on other issues, State regulation of the individual's means of expression is a matter which always requires justification.

Right to a hearing (Article 6(1))—application to appellate proceedings—just satisfaction (Article 50)

*Case No. 13. Ekbatani case.*⁷⁶ The Court held that Sweden had committed a breach of Article 6(1) because having regard to the circumstances of his case, the applicant had not received a proper hearing, as this article of the Convention requires. As just satisfaction under Article 50 the Court ordered the Government to pay the applicant 2,500 Swedish crowns in respect of his costs and expenses before the Swedish Court of Appeal and, as reimbursement of the cost of the Strasbourg proceedings, 110,000 Swedish Crowns, less 24,216.57 French francs already received as legal aid.

The applicant in this case was an American who came to Sweden in 1978 to do research work at the University of Gothenburg, but in March 1981 obtained employment as a tram driver. To do this work he needed a Swedish driving licence and so in April he took a driving test but failed it. This failure led to an angry exchange of views with the official in charge of the test, who reported it to the police. In October Mr Ekbatani was indicted for having threatened a civil servant. At his trial in February 1982 the applicant and the official gave evidence and Mr Ekbatani was found guilty and fined 600 crowns.

The applicant then appealed to the Court of Appeal for Western Sweden claiming that he had not committed the act alleged. After an exchange of memorials on the question of whether it was necessary to hear new witnesses, the applicant formally requested a hearing on the ground that his credibility, as well as that of the injured party, needed thorough examination. The Court of Appeal rejected the

⁷⁴ Judges Spielmann and De Meyer dissented on this issue. Judge Spielmann dissented on the first issue also.

⁷⁵ Article 19(2) of the Covenant specifically includes within the right of freedom of expression information and ideas 'in the form of art'.

⁷⁶ ECHR, judgment of 26 May 1988, Series A, No. 134. This case was decided by the plenary Court.

requests to hear further witnesses and also decided to dispense with a hearing. Its judgment of November 1982 simply stated: 'The Court of Appeal confirms the District Court's judgment'.

In his application to the Commission in 1983 Mr Ekbatani submitted that he was the victim of a violation of Article 6(1) of the Convention because he had not received a hearing in the Court of Appeal. In its report in October 1986 the Commission expressed the opinion that this provision had been violated. The Government and the Commission then referred the case to the Court.

The relevant part of Article 6(1) provides:

In the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing . . .

Mr Ekbatani had clearly not received a hearing in the Court of Appeal, although this requirement had been satisfied at first instance. The case therefore presented two issues for the Court to decide: whether the requirements of Article 6(1) are relevant to appellate proceedings and, if so, whether a hearing should have been held here.

On the first point, which has been touched on in a number of previous cases,⁷⁷ the Court decided that although as a general principle a person is entitled to be present at his initial trial, the application of Article 6 to a subsequent appeal depends on its particular features. Reviewing the proceedings in the present case, the Court observed that the Court of Appeal had respected the principle of equality of arms,⁷⁸ but explained that this principle is only one feature of the wider concept of a fair trial.

The Court pointed out that in the Court of Appeal the main issue was identical to that in the District Court, namely the applicant's guilt or innocence. In the circumstances of the case that issue could not, in the context of a fair trial, be properly determined without a direct assessment of the evidence given in person by the applicant and the complainant. Accordingly the Court considered that a full rehearing of both ought to have taken place. The Government had drawn attention to two special circumstances which in its view justified the appeal court's action. These were that the Court of Appeal could not increase the sentence imposed at first instance and that under Swedish law the case-file was open to the public. As the Court indicated, however, neither point was relevant to the question of the applicant's guilt or innocence. It therefore concluded that there had been a violation of Article 6(1).

As just satisfaction under Article 50 the applicant sought compensation for pecuniary damage which he had allegedly suffered, but the Court rejected his claim as no causal link had been established between the loss and the breach of the Convention. The sums to be paid by the Government were therefore limited to the costs and expenses already mentioned.

Although this case establishes an important point of principle, it does not, of course, follow from it that appellate courts must now adopt the same procedures as

⁷⁷ For example the *Sutter* case, Series A, No. 74, and see this *Year Book*, 55 (1984), p. 373.

⁷⁸ Equality of arms was respected by the Court of Appeal in the sense that neither the applicant nor the prosecutor was allowed to appear in person before it and both were given equal opportunities to present their cases in writing.

courts of first instance. On the contrary, since their function is frequently quite different, they remain free to dispense with a hearing if to hold one would serve no useful purpose. The Court's ruling indicates, however, that a hearing will sometimes be necessary and provides a general indication of the relevant criteria which will no doubt be further clarified in due course.

Right to be brought before an 'officer authorized by law to exercise judicial power' (Article 5(3))—just satisfaction (Article 50)—execution of judgments (Article 54)

*Case No. 14. Pauwels case.*⁷⁹ The Court held unanimously that there had been a violation of Article 5(3) of the Convention because after being arrested the applicant had not been brought 'before a judge or other officer authorized by law to exercise judicial power'. As just satisfaction under Article 50 the Court decided that Belgium must pay the applicant 150,000 Belgian francs in respect of his costs and expenses.

The applicant, when a Senior Captain in the Belgian army, was stationed in the Federal Republic of Germany. In April 1982 the Board of Inquiry of a Field Court Martial ordered his arrest and charged him with embezzlement of State funds. Subsequently Mr Pauwels made four unsuccessful applications for his release. The first application was rejected by the Board of Inquiry itself and the others by the Court Martial which held that one application was ill-founded and the others inadmissible. At his subsequent trial Mr Pauwels was convicted, sentenced to a term of imprisonment and ordered to be dismissed from the army.

Under Belgian law the chairman of a Board of Inquiry is an official called the *auditeur militaire*, or one of his deputies, and the decisions of the Board are his alone. He is the only permanent member of the Board and sits with two officers who are usually appointed for one month by the Area Commanding Officer. The *auditeur militaire* is a member of the judiciary, but as he does not have the status of a judge for the purposes of the Constitution, he is not irremovable. He combines the functions of criminal police officer, investigating judge and representative of the prosecutor's office before Courts Martial. In Mr Pauwels' case the same deputy *auditeur militaire*, Mr Van Even, had chaired the Board of Inquiry and initiated the subsequent prosecution.

In his application to the Commission in 1982 Mr Pauwels claimed that the different functions exercised by Mr Van Even infringed his rights under Article 5(3) of the Convention. In its report in December 1986 the Commission expressed the unanimous opinion that this provision had been violated. The Commission then referred the case to the Court.

Article 5(3) of the Convention provides:

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . .

The applicant claimed that Mr Van Even and the Board which he chaired lacked

⁷⁹ ECHR, judgment of 26 May 1988, Series A, No. 135. The Court consisted of the following Chamber of Judges: Ryssdal (President); Thór Vilhjálmsson, Bindschedler-Robert, Pettiti, Russo, De Meyer, Valticos (Judges).

the independence of the executive and of the parties which the Convention requires. The Government did not deny that the plurality of functions exercised by Mr Van Even contravened Article 5(3), but maintained that he had conducted his investigation impartially and also drew attention to subsequent developments in Belgian law which were designed to prevent the functions of investigation and prosecution from being combined.

Finding that the latter were irrelevant to the present case, the Court nevertheless agreed with the Government that though hierarchically subordinate to the *auditeur général* and the Minister of Justice, the *auditeur militaire* was completely independent in the performance of his twin duties as a member of the public prosecutor's office and as chairman of the Board of Inquiry. The question remained, however, whether Mr Van Even in his capacity as chairman afforded the guarantees of impartiality inherent in the concept of 'officer authorized by law to exercise judicial power' when he could be, and in fact was, called upon to act in the same case as prosecuting authority. Following its decision in the case of *de Jong, Baljet and van den Brink*,⁸⁰ the Court decided that he did not. Since Mr Van Even combined the functions of investigation and prosecution, his impartiality was 'capable of appearing to be open to doubt'.⁸¹ There had therefore been a violation of Article 5(3).

In view of the previous case law this decision was almost inevitable and so it may seem surprising that there was no friendly settlement as in *Ben Yaacoub* (Case No. 4). However the explanation became apparent when the Court turned to the question of just satisfaction under Article 50. For here the applicant claimed a variety of imaginative remedies which no Contracting State could be expected to concede.

First, the applicant requested the reform of domestic law concerning military personnel. In accordance with its settled jurisprudence, the Court ruled that it was not empowered to grant this request.

Secondly, the applicant claimed the value of his lost salary and retirement pension as compensation for pecuniary damage. The Court found, however, that nothing in the evidence indicated that Mr Pauwels' detention on remand would have been brought to an end if a judicial officer had chaired the Board of Inquiry. This claim was therefore dismissed, as was the applicant's claim for a very large sum as compensation for non-pecuniary damage.

Thirdly, the applicant requested the Court to order Belgium to pay a fine of 10,000 francs for each day's delay in complying with the present judgment. Recalling that under Article 53 of the Convention the Contracting States have undertaken to comply with judgments and that under Article 54 it is for the Committee of Ministers to supervise their execution, the Court also dismissed this claim.

Finally Mr Pauwels claimed another large sum in respect of his costs and expenses. Here, however, the Court found that part of the claim did not appear to relate to costs actually and necessarily incurred for the purposes of the case. Taking into account the inadequate supporting documentation and certain other deficiencies, it awarded him on an equitable basis a sum representing just over one fifth of his claim.

⁸⁰ ECHR, judgment of 22 May 1984, Series A, No. 77, and see this *Year Book*, 55 (1984), p. 377.

⁸¹ Judgment, para. 38.

Just satisfaction (Article 50)—compensation for loss of opportunities—costs and expenses—friendly settlement (Rule 53(4))

Cases Nos. 15, 16, 17, 18 and 19. O, H, W, B and R v. United Kingdom (Applications of Article 50).⁸² The Court held unanimously that the United Kingdom was to pay £5,000 to O, £8,000 to R and £12,000 to H, to W and to B for non-pecuniary damage. It also awarded B £10,500 plus VAT, for costs and expenses. Claims by the other four applicants under this head were settled in the course of the proceedings.

In its judgments on the merits in 1987⁸³ the Court held *inter alia* that:

- (a) there had been a violation of Article 8 of the Convention in the cases of W, B and R because the procedures followed by a local authority in reaching certain decisions regarding the applicants' children, who were in its care, had failed to respect the applicants' family life;
- (b) there had been a violation of Article 6(1) of the Convention in the cases of O, W, B and R because while their children were in public care, the applicants were unable to have the question of their access to them determined by a tribunal in accordance with the requirements of that provision;
- (c) there had been violations of Article 6(1) and Article 8 of the Convention in the case of H because the length of proceedings relating to the applicant's access to her child, who was in public care, and to the child's adoption had exceeded a 'reasonable time' and amounted to a failure to respect her family life.

The question of just satisfaction under Article 50 was reserved.

In the present proceedings all five applicants claimed substantial sums as compensation: £500,000 for H, £100,000 for O, for W and for R and unquantified exemplary damages for B. The basis of these claims was the applicants' loss of consortium with their children, some of whom had eventually been adopted, together with the anguish and distress which the applicants claimed to have suffered. The applicants O, B and W also asked the Court to give various directions and make certain further findings and all the applicants initially sought reimbursement of costs and expenses.

To assess these claims the Court first recalled that its judgments on the merits had in no way been concerned with the justification for taking the applicants' children into care, for arranging their adoption, for restricting or terminating the applicants' access to them, or similar matters relating to the substance of the authorities' decisions. Violations of the Convention had been found only with regard to procedural deficiencies, albeit deficiencies intimately connected with an interference with one of the most fundamental of rights, that of respect for family life.

On the evidence available the Court found that it was impossible to say with certainty that the applicants would not have lost the consortium of their children if the deficiencies identified in the relevant proceedings had not existed. On the other hand, it was also unable to say that in that event no practical benefit from having their rights under the Convention respected could have accrued to the applicants.

⁸² ECHR, judgments of 9 June 1988, Series A, Nos. 136-A to E. These cases were decided by the plenary Court.

⁸³ ECHR, judgments of 8 July 1987, Series A, No. 120 (O and H) and No. 121 (W, B and R), and see this *Year Book*, 58 (1987), p. 484.

Having regard to the facts of each case, the Court found that all the applicants could be said to have suffered some loss of real opportunities on account of the breaches of the Convention. Both this and the feelings of distress and frustration they had experienced warranted monetary compensation. Making an assessment on an equitable basis, the Court awarded the sums mentioned earlier and rejected the various other requests for redress.

The claims for costs and expenses by O, H, W and R had been settled in the course of the proceedings. The Court approved these settlements as equitable and in accordance with Rule 53(4) of the Court's rules⁸⁴ as regards this issue struck these cases out of the list. B's claim had not been settled because the Government regarded it as excessive. Having examined the claim in the light of the criteria to be found in its case law, the Court agreed that this was so and awarded the applicant just over half her claim, plus VAT.

Right to respect for correspondence (Article 8)—the meaning of 'the prevention of disorder or crime' and 'necessary in a democratic society' in Article 8(2)—just satisfaction (Article 50)

*Case No. 20. Schönenberger and Durmaz case.*⁸⁵ In this case, which concerned Switzerland, the Court held unanimously that the authorities' action in stopping a letter which had been sent to a person in custody constituted a violation of Article 8 of the Convention. As just satisfaction under Article 50 it held that Switzerland must pay 6,230 Swiss francs to the first applicant and 2,750 francs to the second applicant in respect of their costs and expenses.

The applicants in this case were a Swiss barrister and a Turkish national, who at the material time was in custody in Zurich awaiting trial on certain drug charges. In February 1984 the barrister, Mr Schönenberger, wrote to Mr Durmaz at the request of Mrs Durmaz, asking him to sign and return forms which would authorise Mr Schönenberger to prepare his defence and which he included with his letter. However the local district prosecutor decided not to forward the letter and the enclosures as the letter advised Mr Durmaz of his right to refuse to make a statement. The applicants appealed against the prosecutor's ruling and were partially successful when the Federal Court decided that it was contrary to the Constitution to stop the forms. At the same time the Court held that stopping Mr Schönenberger's letter had been lawful because it related to pending criminal proceedings and gave Mr Durmaz advice on his course of conduct during the investigation.

In their application to the Commission in 1985 Mr Schönenberger and Mr Durmaz complained that the action of the authorities violated the 'right to respect for . . . correspondence' which is guaranteed by Article 8 of the Convention, together with the right to freedom of expression, which is protected by Article 10. In its report in May 1986 the Commission expressed the unanimous opinion that there had been a violation of Article 8, and decided that no issue arose under Article 10. The Commission and the Government then referred the case to the Court.

Here, as in many cases concerning Article 8, there was no doubt that the action

⁸⁴ For the text of this Rule see Case No. 23 below.

⁸⁵ ECHR, judgment of 20 June 1988, Series A, No. 137. This case was decided by the following Chamber of Judges: Ryssdal (President); Cremona, Bindschedler-Robert, Pettiti, Sir Vincent Evans, Bernhardt, De Meyer (Judges).

of the authorities constituted an interference with the applicants' rights. Moreover, unlike *Olsson* (Case No. 2), in the present case it was clear that the interference was 'in accordance with the law', as Article 8(2) requires. The Court therefore had only two questions to answer: had Mr Schönenberger's letter been stopped to further one of the aims set out in Article 8(2) and, if so, was this interference with his correspondence 'necessary in a democratic society'?

As regards the first issue the Government maintained that the aim of stopping the letter had been 'the prevention of disorder or crime'. For obvious reasons this aspect of Article 8(2) is frequently relied on in cases concerned with correspondence to and from prisoners and the Court agreed with the Commission that it was applicable here. Recalling that in the *Golder* case⁸⁶ it had held that the pursuit of this objective may 'justify wider measures of interference in the case of a . . . [convicted] prisoner than in that of a person at liberty',⁸⁷ the Court stated that the same reasoning could be applied to a person such as Mr Durmaz, who was being held on remand. The aim of the interference was therefore legitimate.

To support their argument that the stopping of the letter was also 'necessary' the Government relied on the fact that it gave Mr Durmaz advice, which, it was suggested, could jeopardize the impending criminal proceedings. Not surprisingly the Court, which has consistently championed the rights of defendants, found this submission unconvincing. Pointing out that Mr Schönenberger's advice to Mr Durmaz was to adopt a tactic which was perfectly lawful, the Court held that the contents of the letter were not capable of creating a danger of connivance and so did not pose a threat to the conduct of the prosecution. It was true that at the time the letter was written Mr Schönenberger had not been instructed by Mr Durmaz, but the Court attached little importance to this. Bearing in mind that the letter was written at the request of Mrs Durmaz and in an attempt to ensure that her husband was defended, it held that no formal appointment was necessary. In the circumstances the contested interference was not 'necessary in a democratic society' and there had therefore been a breach of Article 8.

As just satisfaction under Article 50 both applicants sought compensation for pecuniary and non-pecuniary damage, as well as their costs and expenses. As regards compensation the Court rejected Mr Schönenberger's claim, which was for loss of fees, on the ground that he had not shown that his offer to represent Mr Durmaz would have been accepted.⁸⁸ Both applicants' claims for non-material loss were also rejected because the Court held that its judgment constituted adequate satisfaction. In respect of the proceedings conducted in Switzerland and before the Convention institutions, however, the Court made a determination on an equitable basis and awarded the applicants their costs and expenses.

⁸⁶ ECHR, judgment of 21 February 1975, Series A, No. 18, and see this *Year Book*, 47 (1973-4), p. 391.

⁸⁷ Judgment, para. 45.

⁸⁸ After being detained on remand for a month Mr Durmaz was freed and the prosecution abandoned. While his case was under investigation he was assisted by another lawyer appointed at his request by the District Court.

Right to respect for family life (Article 8)—application to the expulsion of an alien—the meaning of ‘necessary in a democratic society’ in Article 8(2) and of ‘inhuman’ and ‘degrading’ treatment in Article 3—just satisfaction (Article 50)

*Case No. 21. Berrehab case.*⁸⁹ In this case, which concerned the expulsion of an immigrant from the Netherlands, the Court held by 6 votes to 1 that there had been a violation of Article 8 of the Convention, but unanimously rejected a claim under Article 3. As just satisfaction under Article 50 the Court awarded the applicants 20,000 guilders for non-pecuniary damage and travel expenses.

In 1977 Mr Berrehab, a Moroccan citizen, married Mrs Koster, a Netherlands national. In 1979 they had a daughter Rebecca, who is also a Netherlands national. Shortly after Rebecca's birth Mr Berrehab and his wife were divorced, which caused the authorities to refuse to renew Mr Berrehab's residence permit and in 1984 to expel him from the Netherlands. In 1985 Mr Berrehab remarried Mrs Koster and was given permission to reside in the Netherlands 'for the purpose of living with his Dutch wife and working during that time'.

In their application to the Commission in 1983 Mr Berrehab and his daughter complained that the measures taken against Mr Berrehab were an interference with the right to respect for family life and also constituted inhuman or degrading treatment, contrary to Article 3. In its report in 1986 the Commission expressed the opinion that there had been a violation of Article 8, but not of Article 3. The Commission and the Government then referred the case to the Court.

The main issues in this case concerned the scope of Article 8(1) of the Convention, which protects 'the right to respect for . . . family life', and the application of Article 8(2), which authorizes interferences with the right in certain circumstances.

The first question was whether Article 8 was applicable. This turned on whether for the purposes of the Convention there can be 'family life' in the absence of cohabitation. Following its approach to an analogous situation in the *Abdulaziz* case,⁹⁰ the Court held that 'family life' is a broad concept, saying:

The Court . . . does not see cohabitation as a *sine qua non* of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage—such as that contracted by Mr and Mrs Berrehab—has to be regarded as 'family life' . . . It follows from the concept of family on which Article 8 is based that a child born of such union is *ipso jure* part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to 'family life', even if the parents are not then living together.⁹¹

Subsequent events might, of course, break that tie, but the Court decided that in the present case this had not occurred because until he was expelled Mr Berrehab saw his daughter frequently and greatly valued their meetings. Thus although he was no longer living with Mrs Koster at the time, the ties of family life between Mr Berrehab and his daughter had not been broken.

⁸⁹ ECHR, judgment of 21 June 1988, Series A, No. 138. The Court consisted of the following Chamber of Judges: Ryssdal (President); Thór Vilhjálmsson, Lagergren, Russo, Spielmann, De Meyer (Judges); Martens (ad hoc Judge).

⁹⁰ *Abdulaziz, Cabales and Balkandali* case, ECHR, judgment of 28 May 1985, Series A, No. 94, and see this *Year Book*, 56 (1985), p. 352.

⁹¹ Judgment, para. 21.

The next question was whether as a result of Mr Berrehab's expulsion there had been an interference with the applicants' right to respect for their family life. The Government argued that there had not because Mr Berrehab was free to travel from Morocco to the Netherlands on a temporary visa to visit his daughter. The Court, like the Commission, found this point unconvincing. The possibility mentioned by the Government was 'somewhat theoretical',⁹² and when Mr Berrehab had first applied for such a visa it had been refused. Thus in practice the disputed measures prevented regular contacts from being maintained 'although such contacts were essential as the child was very young'.⁹³ There had therefore been an interference with the applicants' rights.

The most difficult issue was whether the interference could be justified under Article 8(2). This permits interferences which are in accordance with the law and necessary in a democratic society in the interests of, *inter alia*, public safety, the economic well-being of the country and the protection of the rights and freedoms of others. There was no doubt that the disputed measures were in accordance with the law, and after considering each of the aims mentioned above, the Court decided that as Mr Berrehab was expelled in furtherance of Netherlands immigration policy, the relevant aim was the preservation of 'the economic well-being of the country' through regulation of the labour market.

Were the measures against Mr Berrehab 'necessary' to achieve this aim? The Court acknowledged that in principle the Convention does not prevent the Contracting States from regulating the entry and length of stay of aliens and added that it was not the Court's function to pass judgment on the respondent's immigration policy as such, but rather to weigh the legitimate aim pursued against the seriousness of the interference with the applicants' right to respect for their family life. Having regard to the particular circumstances, the Court considered that a proper balance had not been achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim. Since the disputed measures were not 'necessary in a democratic society', the Court concluded that there had been a violation of Article 8.

The applicants' claim that they were also the victims of 'inhuman' or 'degrading' treatment contrary to Article 3 was dismissed on the ground that any suffering they had experienced was not serious enough to fall within this provision. The only remaining issue was therefore the question of compensation under Article 50. Here the Court accepted the Government's argument that Mr Berrehab was not entitled to compensation for his loss of earnings in the Netherlands, but, taking its decision on an equitable basis, unanimously awarded the applicants 20,000 guilders for travel expenses and non-pecuniary damage.

Judge Thór Vilhjálmsson voted against the decision on the issue of Article 8(2). In his dissenting opinion he emphasized the State's margin of appreciation in immigration matters and held that in the light of this and the particular circumstances of the case, the measures taken by the authorities could be justified.

⁹² Ibid., para. 23.

⁹³ Ibid.

Right to an effective remedy before a national authority (Article 13)—freedom of association (Article 11)

*Case No. 22. Plattform 'Ärzte für das Leben' case.*⁹⁴ In this case, which concerned Austria, the Court held unanimously that there had been no violation of Article 13 of the Convention.

This case originated in an application lodged with the European Commission in September 1982 by an association of doctors opposed to legalised abortion, the *Plattform 'Ärzte für das Leben'*. The association's claim was that it had not had sufficient police protection during two demonstrations which it had organized and which had been disrupted by persons opposed to its activities. The application submitted that for this reason there had been a violation of Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of association). The association also relied on Article 13, claiming that the Austrian legal order did not provide an 'effective remedy before a national authority' in relation to the above rights. Having declared the application partially admissible, the Commission in its report in March 1987 expressed the unanimous opinion that there had been a breach of Article 13. The Commission then referred the case to the Court.

Article 13, which has been quoted earlier,⁹⁵ has been interpreted by the Court as guaranteeing an effective remedy to anyone who can claim 'on arguable grounds' to be the victim of a violation of any of the rights and freedoms protected by the Convention. As we have seen, to substantiate a claim based on Article 13 it is not essential to show that another article has actually been infringed; consequently the rejection of a claim by the Commission, even on the ground that it is manifestly ill-founded, is not necessarily fatal to such a claim. In the present case *Plattform* had relied *inter alia* on Article 11 which protects, among other freedoms, freedom of assembly. The Commission, however, had declared this complaint inadmissible as manifestly ill-founded. The Court's task was therefore to ascertain whether the claim that Article 11 had been infringed was arguable, notwithstanding that the Commission had rejected it. The relevant part of Article 11 provides: 'Everyone has the right to freedom of peaceful assembly . . . '.

The association's argument that its rights had been infringed relied on the fact that their first demonstration, a march, was disrupted by counter-demonstrators who shouted and threw eggs and clumps of grass at those taking part. The police, who were present, intervened only to separate the opposing groups when tempers had risen to the point where physical violence seemed imminent. The second demonstration, in the Cathedral Square in Salzburg, was also disrupted by counter-demonstrators who were dispersed by the police only at the end.

Plattform complained that the Austrian authorities had disregarded the true meaning of freedom of assembly by failing to take more effective action. The Government's response was to submit that Article 11 does not impose any positive obligation to protect demonstrations. Not surprisingly, the Court, like the Commission, took a very different view. Without attempting to develop what it called 'a

⁹⁴ ECHR, judgment of 21 June 1988, Series A, No. 139. The Court consisted of the following Chamber of Judges: Ryssdal (President), Gölcüklü, Matscher, Pinheiro Farinha, Macdonald, Spielmann, Carrillo Salcedo (Judges).

⁹⁵ See Case No. 10.

general theory of positive obligations',⁹⁶ it made it clear that it regarded the State's responsibilities under Article 11 much more widely.

On this vital issue of principle the Court said:

A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.

Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be . . .⁹⁷

Having ruled that Article 11 imposes a duty on States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, the Court explained that this cannot be guaranteed absolutely and States have had a wide discretion in the choice of means. Reviewing the facts and without expressing a view as to the expediency or efficiency of the tactics adopted by the police, the Court found that the Austrian authorities had not failed to take reasonable and appropriate measures. Both demonstrations had been policed, no damage was done, there were no serious clashes and on each occasion the association had been able to conduct a religious service as planned. In these circumstances the Court concluded that no arguable claim that Article 11 had been violated had been made out and so the claim under Article 13 failed.

Although the complaint in this case concerned Article 13, its most interesting feature is the Court's discussion of the scope of Article 11. There is relatively little case law on this provision and this is the first occasion on which the rights of demonstrators and the corresponding obligations of the Contracting States have been considered. As regards domestic remedies, the decision confirms the point suggested by *Boyle and Rice* (Case No. 10), that when a complaint relating to one of the Convention's substantive provisions has been rejected, it will generally be difficult to make out a case under Article 13.

Just satisfaction (Article 50)—friendly settlement (Rule 53(4))

Case No. 23. Bouamar case (Application of Article 50).⁹⁸ In view of the friendly settlement between the Belgian Government and the applicant in respect of the latter's claim for just satisfaction under Article 50 of the Convention, the Court unanimously decided to strike this case out of its list.

In its judgment on the merits (Case No. 8 above) the Court found that successive placements of the applicant in a remand prison as an interim custody measure amounted to 'unlawful' detention contrary to Article 5(1) and that, contrary to

⁹⁶ Judgment, para. 31.

⁹⁷ Ibid., para. 32.

⁹⁸ ECHR, judgment of 27 June 1988, Series A, No. 136F. The Court consisted of the following Chamber of Judges: Ryssdal (President); Thór Vilhjálmsson, Walsh, Sir Vincent Evans, Macdonald, Russo, De Meyer (Judges).

Article 5(4), the applicant had been unable to take proceedings to challenge their lawfulness. The question of just satisfaction under Article 50 was reserved.

In June 1988, soon after the decision on the merits, the Government notified the Court that it was willing to pay Mr Bouamar the sum of 150,000 Belgian francs which he had claimed as compensation. The applicant subsequently made known his agreement to this arrangement and the Delegate of the Commission indicated that he had no objection.

In cases of this kind the Court's function is defined by Rule 53(4) of the Rules of the Court, which provides:

If the Court is informed that an agreement has been reached between the injured party and the party liable, it shall verify the equitable nature of such agreement and, where it finds the agreement to be equitable, strike the case out of the list by means of a judgment . . .

In a short judgment the Court found that the agreement was equitable and therefore decided to strike the case from its list.

Right to a fair trial (Article 6(1))—application to criminal proceedings involving unlawfully obtained evidence—the presumption of innocence (Article 6(2))

*Case No. 24. Schenk case.*⁹⁹ In this case, which concerned Switzerland, the Court held that there had been no violation of either Article 6(1) or Article 6(2) of the Convention.

The applicant, Mr Schenk, had been involved in divorce proceedings in Switzerland since 1974. In 1981 P, who lived in France and had been given illegal assignments by Mr Schenk on various occasions, contacted Mrs Schenk and informed her that her husband had instructed him to kill her. They informed the local investigating judge who began an inquiry. In execution of a request for assistance to the French authorities, P gave evidence to the French police in the presence of a Swiss police inspector. P later gave the inspector a cassette containing the recording of an incriminating telephone call from Mr Schenk which P had made without the applicant's knowledge. In Swiss law the making of such a recording was illegal, but the cassette was added to the file on the case opened by the investigating judge.

After being charged with incitement to murder, the applicant was initially discharged, but on appeal by the prosecution was committed for trial. In August 1982 the trial court, basing itself in part on the tape recording, sentenced Mr Schenk to ten years imprisonment. Mr Schenk challenged the making and use of the recording in two appeals, but was unsuccessful. In December 1984, however, he was given a partial pardon and released.

In his application to the Commission in 1984 Mr Schenk relied on Articles 6 and 8 of the Convention. The Commission ruled that his application was inadmissible as regards certain aspects of Article 8, and in its report in May 1987 expressed the opinion that there had been no violation of Article 6. The Commission and the Government then referred the case to the Court.

The main question for the Court in this case concerned Article 6(1); specifically whether, as the applicant maintained, the use of unlawfully obtained evidence by the prosecution meant that he had been denied a fair trial. In addressing this question the Court recalled that it was not its function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they might have

⁹⁹ ECHR, judgment of 12 July 1988, Series A, No. 140. This case was decided by the plenary Court.

infringed rights and freedoms protected by the Convention. Article 6 guaranteed the right to a fair trial but contained no rules relating to the admissibility of evidence, which was thus primarily a matter for national law. It followed that the Court could not rule out the use of unlawfully obtained evidence as a matter of principle. The issue was rather whether Mr Schenk's trial as a whole was fair.

On the particular facts the Court noted first that at Mr Schenk's trial the rights of the defence had not been disregarded. The applicant had been able to dispute the authenticity of the recording and challenge its use. He had sought and had obtained an investigation of P, and his lawyer could, if he had wished, have examined P at the criminal trial. Mr Schenk did not summon the police inspector who had obtained the recording although again he could have done so. Finally, the recording was not the only evidence on which the conviction was based. Taking all these factors into account, the Court concluded by 13 votes to 4 that the applicant's trial was not unfair and that consequently there had been no breach of Article 6(1).

A second claim concerned Article 6(2) which enshrines the presumption of innocence.¹⁰⁰ Here Mr Schenk submitted that use of the unlawfully obtained recording by the trial court meant that he had not been proved guilty 'according to law' as Article 6(2) requires. The Court unanimously rejected this submission. In its view the record of the hearings and the text of the judgment contained nothing to suggest that the trial court had treated the applicant as guilty before his conviction. The mere inclusion of the cassette in the evidence could not suffice to support his allegation and so there had been no breach of Article 6(2).

Mr Schenk's final claim was that the use of the tape recording constituted an interference with the right to respect for correspondence which is guaranteed by Article 8. Since the Commission's ruling on admissibility was concerned only with a complaint about the making of the recording, the Court found that there would be no obstacle to its reviewing the use which had been made of it. It decided, however, by 15 votes to 2, that consideration of Article 8 was unnecessary because the relevant issues were subsumed in its earlier ruling on Article 6.

Like a number of other cases decided in the period under review, this decision casts further light on the concept of a fair trial and illustrates the delicate issues of policy which this fundamental principle of justice can give rise to. While the use of illegally obtained evidence is clearly a practice which calls for the most careful scrutiny, the Court was correct to see the issue here as one involving Article 6(1) rather than Article 6(2). A more substantial treatment of the presumption of innocence will be found in the *Salabiaku* case below.

The presumption of innocence (Article 6(2))—application to offences involving presumptions of fact or law—right to a fair trial (Article 6(1))

*Case No. 25. Salabiaku case.*¹⁰¹ In this case, which concerned France, the Court decided unanimously that there had been no violation of either Article 6(1) or Article 6(2) of the Convention.

In July 1979 Mr Salabiaku, a citizen of Zaire, was detained at Roissy airport shortly after he had taken possession of a trunk which was found to contain ten

¹⁰⁰ For the text of Article 6(2) see Case No. 25 below.

¹⁰¹ ECHR, judgment of 7 October 1988, Series A, No. 141A. The Court consisted of the following Chamber of Judges: Ryssdal (President); Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Pettiti, Walsh (Judges).

kilograms of cannabis. In March 1981 a French court found him guilty of the criminal offence of unlawfully importing narcotics and the customs offence of smuggling prohibited goods. For the first offence he was sentenced to two years imprisonment and for the second offence he was fined 100,000 francs. On appeal to the Paris Court of Appeal Mr Salabiaku was given the benefit of the doubt on the criminal charge, but his conviction for the customs offence was upheld. On further appeal to the Court of Cassation this conviction was again confirmed, the Court basing itself on Article 392(1) of the Customs Code, according to which 'the person in possession of contraband goods is deemed liable for the offence'. Mr Salabiaku had argued that this section was repealed by implication when France became a party to the European Convention, but the Court of Cassation rejected his argument and also found that he had failed to establish a case of *force majeure* capable of exculpating him.

In his application to the Commission in 1983 Mr Salabiaku claimed that France had violated its obligations towards him under Articles 6(1) and 6(2) of the Convention. In its report in July 1987 the Commission expressed the opinion that neither article had been violated. The Commission then referred the case to the Court.

The main issue in this case concerned Article 6(2) of the Convention which provides:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The applicant's argument was that the 'almost irrebuttable' presumption on the basis of which the French courts had proceeded was incompatible with this provision. In the view of the Government and the Commission, on the other hand, he had been proved guilty 'according to law'. The Court's starting point was the principle that the Contracting States are free in principle and subject to certain conditions to establish an offence on the basis of an objective fact as such, whether or not it results from criminal intent or negligence. It pointed out, however, that the applicant had not been convicted for mere possession of unlawfully imported goods, but for smuggling such goods. The legal presumption of accountability, which under Article 392(1) of the Customs Code was inferred from their possession, led to a finding of guilt.

Explaining that 'this shift from the idea of accountability in criminal law to the notion of guilt shows the very relative nature of such a distinction',¹⁰² the Court then made the following significant observation:

Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider . . . paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which by protecting the right to a fair

¹⁰² Judgment, para. 28.

trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law . . . ¹⁰³

And from this it concluded:

Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. The Court proposes to consider whether such limits were exceeded to the detriment of Mr Salabiaku.¹⁰⁴

With the relevance of Article 6(2) established, it remained for the Court to consider the immediate issue. It decided that in Mr Salabiaku's case possession of the disputed goods had been duly proved by the prosecution. In French law the 'person in possession' who was 'deemed liable for the offence' could be given the benefit of extenuating circumstances and acquitted if he could establish a case of *force majeure*. It was thus clear that the French courts enjoyed a genuine freedom of assessment in this field. Turning to the particular facts, the Court noted that the competent French courts had applied Article 392(1) of the Customs Code in a way which was compatible with the presumption of innocence, and indeed appeared to have identified an element of intent in the circumstances of the case, even though this was not necessary in order to convict. Since it was clear that the French courts had not resorted automatically to the presumption laid down in the Code, but had carefully exercised their power of assessment, they had not applied the law in a way which conflicted with the presumption of innocence. The Court therefore concluded that there had been no violation of Article 6(2).

Having found that there had been no violation of the presumption of innocence, the Court briefly considered the applicant's argument that he had been denied a fair trial, as required by Article 6(1). The complaints here were, the Court found, very similar to those it had already examined in relation to Article 6(2). On these points the Court found no reason to depart from its earlier conclusion. As regards various other matters it held that the evidence did not show any failure to comply with the requirements of Article 6(1). In particular the proceedings at first instance, on appeal and in the Court of Cassation had been fully judicial and adversarial in nature as the applicant acknowledged. The Court therefore concluded that there had been no violation of Article 6(1).

Although this is not the first case in which the Court has considered the presumption of innocence,¹⁰⁵ it raises an important point about the scope of this principle which has not been examined before. By deciding that Article 6(2) has a bearing on the way offences are defined—that is on the content of a State's criminal law—the Court has given this provision a wide interpretation which is consistent with its approach to other aspects of Article 6. While its reasons for holding that there was no violation here are persuasive, it is not difficult to imagine situations in which the use of presumptions of fact or law could be oppressive. Since such abuses are not directly covered by any other provision, this latest interpretation of Article 6(2) is to be welcomed.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ The presumption of innocence had recently been considered in the *Lutz* case, the *Englert* case and the *Nölkenbockoff* case, ECHR, judgments of 25 August 1987, Series A, No. 123, and see this *Year Book*, 58 (1987), p. 490.

Just satisfaction (Article 50)—causation—pecuniary and non-pecuniary damage—friendly settlement (Rule 53(4))

Case No. 26. Weeks case (Application of Article 50).¹⁰⁶ The Court held unanimously that the United Kingdom was to pay the applicant £8,000 in respect of pecuniary and non-pecuniary damage. It also took note of a settlement between the respondent and the applicant regarding the latter's claim for costs and expenses.

In its judgment on the merits in 1987 the Court held that Mr Weeks had been the victim of a violation of Article 5(4) of the Convention because he had been unable to take legal proceedings to challenge the lawfulness of his detention during the currency of an indeterminate life sentence.¹⁰⁷ The question of Article 50 was reserved.

In the present proceedings the applicant, who had been detained from 1966, when he was 17, to 1985 with brief periods of release on licence, claimed approximately £59,000 as compensation for pecuniary loss on the ground that if he had been entitled to take proceedings complying with Article 5(4), he would have been released earlier and would have obtained gainful employment. He also sought £45,000 as compensation for non-pecuniary loss, based on the adverse effect of the detention on his personal life and development. The Government contested both claims.

In assessing these issues the Court agreed with the Government that since no violation of Article 5(1) had been established, no compensation was payable in respect of the harmful consequences of the applicant's deprivation of liberty. However, although the only prejudice which was relevant was that which flowed from the violation of Article 5(4), the Court found that the absence of a judicial remedy could be said to have caused Mr Weeks pecuniary damage in the form of a loss of opportunities and non-pecuniary damage in the form of a feeling of frustration and helplessness.

In April 1987 Her Majesty the Queen, on the recommendation of the Home Secretary, remitted the applicant's life sentence by means of the Royal Prerogative. But in the Court's view neither this, nor the judgment on the merits, could be considered as adequate just satisfaction for the non-pecuniary prejudice suffered up to that time. In fixing the amount of compensation to be awarded the Court held that account had to be taken of the special features of the case: the severity of the indeterminate life sentence in relation to the crime committed,¹⁰⁸ the applicant's youth and also his behavioural problems.¹⁰⁹ Taking both heads of damage together and deciding the matter on an equitable basis, the Court decided that a sum of £8,000 should be awarded.

The applicant's claim for costs and expenses was settled during the course of the proceedings. Having regard to the terms of the agreement between the Government and the respondent, and the absence of any objection on the part of the Commission's Delegate, the Court found that it was of an 'equitable nature' within the

¹⁰⁶ ECHR, judgment of 5 October 1988, Series A, No. 143A. This case was decided by the plenary Court.

¹⁰⁷ ECHR, judgment of 2 March 1987, Series A, No. 114, and see this *Year Book*, 58 (1987), p. 470.

¹⁰⁸ The applicant's sentence followed his conviction on several counts including armed robbery with a starting pistol and involving the sum of 35 pence.

¹⁰⁹ The applicant's unstable behaviour and criminal activity led to his recall to prison, after he was first released on licence in 1976.

meaning of a Rule 53(4) of the Rules of the Court.¹¹⁰ Accordingly, the Court took note of the agreement and as regards this aspect of the claim decided to strike the case out of the list.

Pre-trial detention (Article 5(3))—trial within a reasonable time (Article 6(1))—right to legal assistance in criminal cases (Article 6(3)(c) and Article 5(4))—friendly settlement (Rule 48(2))

*Case No. 27. Wookam Moudefo case.*¹¹¹ In the light of the friendly settlement concluded between the French Government and the applicant, the Court unanimously decided to strike this case out of the list.

The applicant, a national of the State of Cameroon, was arrested in France in October 1980 on a charge of armed robbery and remained in detention on remand until December 1983 when an investigating judge ordered his discharge. In his application to the European Commission in September 1983 Mr Moudefo complained that the length of his detention on remand violated Article 5(3) of the Convention, that the length of the criminal proceedings against him violated his right to a hearing within a reasonable time, guaranteed by Article 6(1) and that the failure to provide him with a lawyer for proceedings in the Court of Cassation concerning his release from detention violated his right to be provided with legal assistance contrary to Article 6(3)(c). In its report in July 1987 the Commission found a violation of Articles 5(3), 6(1) and 5(4) and referred the case to the Court.

In July 1988 the Court was informed that a friendly settlement had been concluded between the Government and the applicant under which Mr Moudefo accepted compensation of 134,000 French francs, in addition to the 30,000 francs which the Compensation Board of the Court of Cassation had awarded him in 1986.

In view of the settlement the Government requested the Court to strike the case off its list in accordance with Rule 48(2) which has been quoted earlier.¹¹² Taking formal note of the friendly settlement, the Court held that as far as the general interest was concerned there were no reasons of public policy to justify a continuation of the proceedings. In particular it pointed out that it had reviewed the relevant aspects of Articles 5(3) and 6(1) in many previous cases.¹¹³ As regards the applicant's complaint under Article 6(3)(c), which the Commission had considered under Article 5(4), the Court's case law again provided guidance for the interpretation of these provisions.¹¹⁴ Accordingly the Court decided that it was appropriate to strike the case out of the list.

J. G. MERRILLS

¹¹⁰ For the text of Rule 53(4) see *Bouamar* (Case No. 23, above).

¹¹¹ ECHR, judgment of 11 October 1988, Series A, No. 141 B. The Court consisted of the following Chamber of Judges: Ryssdal (President); Pinheiro Farinha, Pettiti, Sir Vincent Evans, Russo, Carrillo Salcedo, Valticos (Judges).

¹¹² See *Ben Yaacoub* (Case No. 4, above).

¹¹³ Three recent examples are *Capuano*, *Baggetta* and *Milasi*, Series A, No. 119, and see this *Year Book*, 58 (1987), p. 482.

¹¹⁴ See, for example, *Goddi*, Series A, No. 76, and see this *Year Book*, 55 (1984), p. 376.

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING

1987-8*

National courts have no jurisdiction to declare acts of Community institutions invalid

*Case No. 1. Firma Foto-Frost v. Hauptzollamt Lübeck-Ost.*¹ British and Dutch dealers imported prismatic binoculars from the German Democratic Republic, without paying customs duties, and re-sold them to the plaintiff, a dealer in the German Federal Republic. At first the customs authorities in the German Federal Republic decided that the binoculars were not subject to customs duties, but later they changed their minds. However, since the plaintiff had acted in good faith, the customs authorities sought permission from the Commission of the European Communities to refrain from claiming customs duties from the plaintiff. By a decision dated 6 May 1983, the Commission refused permission. The plaintiff argued that that decision was contrary to EEC Regulation 1697/79. The matter came before a West German court, which asked the Court of Justice of the European Communities to give a preliminary ruling under Article 177 of the EEC Treaty.

In its first question, the West German court asked the Court of Justice of the European Communities whether national courts had jurisdiction to declare invalid a decision of the type taken by the Commission on 6 May 1983.

There are some strong arguments (which the Court of Justice of the European Communities did not mention) in favour of an affirmative reply to that question. Article 177 of the EEC Treaty reads as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

It is clear that national courts have jurisdiction to interpret the EEC Treaty and acts of Community institutions; a national court is under no obligation to refer such questions of interpretation to the Court of Justice of the European

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¹ [1988] 3 CMLR 57 (judgment delivered on 22 October 1987).

Communities unless it is 'a court . . . of a member State, against whose decisions there is no judicial remedy under national law'.² Article 177 treats questions of the validity of the acts of Community institutions in the same way as it treats questions of their interpretation. Therefore, if a national court can decide a question of interpretation without referring it to the Court of Justice of the European Communities, it ought to be able to decide a question of validity without referring it to the Court of Justice of the European Communities; and the power to decide a question of validity logically implies a power to hold the act invalid as well as a power to hold it valid. Article 41 of the ECSC Treaty provides:

The Court shall have sole jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is in issue in proceedings brought before a national court or tribunal.

The absence of any similar reference in Article 177 to the Court of Justice of the European Communities exercising 'sole jurisdiction' supports the view that, under the EEC Treaty, the power to hold acts of Community institutions invalid is shared between the Court of Justice of the European Communities and national courts.

But the Court decided that national courts did not have jurisdiction to declare acts of Community institutions invalid. In the words of the Court:

Those courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling the existence of the Community measure in question.

On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in . . . *International Chemical Corporation v. Amministrazione delle Finanze*,³ the main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirements of legal certainty.

The same conclusion is dictated by consideration of the necessary coherence of the system of judicial protection established by the Treaty. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. As the Court pointed out in . . . *Parti Écologiste 'Les Verts' v. European Parliament*,⁴ 'in Articles 173 and 184, on the one hand,

² Despite the categorical wording of the final paragraph of Article 177, the Court of Justice of the European Communities has held that even the highest courts in member States are under no obligation to refer such questions of interpretation to the Court of Justice of the European Communities where there is no reasonable doubt as to the correct interpretation of the relevant rule of Community law: *CILFIT v. Ministry of Health*, [1982] ECR 3415. For another exception to the final paragraph of Article 177, see *Hoffmann-La Roche v. Centrafarm*, [1977] ECR 957, 973.

³ [1981] ECR 1191, 1215. In that case the Court also said: 'although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution . . . to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard the act as void for the purposes of a judgment which it has to give' (ibid.).

⁴ [1986] ECR 1339, 1365.

and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.

Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.

It must also be emphasized that the Court of Justice is in the best position to decide on the validity of Community acts. Under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, Community institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question. Furthermore, under the second paragraph of Article 21 of that Protocol the Court may require the member States and institutions which are not participating in the proceedings to supply all information which it considers necessary for the purposes of the case before it.

However, the Court recognized that there might be an exception to the rule that national courts had no jurisdiction to declare acts of Community institutions invalid, in cases where the plaintiff was seeking interlocutory relief (*procédure en référé, einstweilige Verfügung*);⁵ but the present case did not fall into that category.

The Court then turned to the other questions raised by the West German court and held (for reasons which are unlikely to interest the readers of this *Year Book*) that the Commission's decision of 6 May 1983 was invalid because it was contrary to Regulation 1697/79.

The Court's judgment in the *Foto-Frost* case will probably lead to an increase in the number of cases referred to the Court of Justice of the European Communities by national courts under Article 177. Thus, in *R v. Minister of Agriculture, ex p. Fédération Européenne de la Santé Animale*, Henry J referred to the *Foto-Frost* case and held that, where a national court is faced with a case which turns solely on the disputed validity of an EEC directive, the national court should refer the case to the Court of Justice of the European Communities under Article 177, because otherwise the party challenging the directive would be left without a remedy.⁶

Fees for education—discrimination on grounds of nationality—retroactive effect of judgments—duty of national courts not to apply national laws which conflict with Community law—dual nationality

*Case No. 2. Barra and others v. Belgian State and the City of Liège.*⁷ For many years Belgium required foreign students to pay a *minerval* (enrolment fee) which students of Belgian nationality were not required to pay. In *Gravier v. City of Liège* the Court of Justice of the European Communities held that 'the imposition on students who are nationals of other member States of . . . the so-called "minerval" as a condition of access to vocational training, where the same fee is not imposed on

⁵ For further discussion of this exception, see the opinion of the Advocate General in the *Foto-Frost* case, [1988] 3 CMLR 57, 72, and the Court's judgment in *Hoffmann-La Roche v. Centrafarm*, [1977] ECR 957, 973. See also Anthony Arnall's case note in *European Law Review*, 13 (1988), pp. 125, 129-31.

⁶ [1988] 3 CMLR 207.

⁷ [1988] 2 CMLR 409.

students who are nationals of the host member State, constitutes discrimination on grounds of nationality contrary to Article 7 of the [EEC] Treaty'.⁸

After the judgment in the *Gravier* case, Belgium passed a law which provided that nationals of other member States of the EEC would be able to reclaim the *minerval* which they had paid before 1985 only if they had begun proceedings in a Belgian court to claim repayment before 13 February 1985, the date on which the Court of Justice of the European Communities had decided the *Gravier* case. The plaintiffs, who had begun such proceedings after 13 February 1985, argued that the Belgian law was contrary to Community law. The Belgian court hearing their case asked the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the EEC Treaty.

The first question asked by the Belgian court was whether the interpretation of the EEC Treaty given in the *Gravier* case applied only to the future, or whether it applied also to the past. The Court of Justice of the European Communities held that all judgments by the Court interpreting Community law under Article 177 apply both to the future and to the past, unless otherwise specified by the Court itself.

... it is only exceptionally that the Court may, applying a general principle of legal certainty inherent in the Community legal system, taking account of the serious mischief which its judgment may cause to past legal relations established in good faith, find it necessary to limit the possibility for any person ... to invoke the provision, as thus interpreted, in order to call those legal relations into question.⁹

However, according to this Court's settled case law, such limitation can only be laid down in the very judgment which gives the ruling on the interpretation requested. The fundamen-

⁸ [1985] ECR 593, 615. Article 7, first paragraph, of the EEC Treaty provides: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

Vocational training is interpreted very broadly. For instance, in *Blaizot v. University of Liège*, [1989] 1 CMLR 57, 65-6, the Court held that university studies in veterinary medicine fell within the definition of vocational training, and said:

'... any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and level of training of the pupils or students, and even if the training programme includes an element of general education.'

'With regard to the issue whether university studies prepare for a qualification for a particular profession, trade or employment or provide the necessary training and skills for such a profession, trade or employment, it must be emphasized that that is the case not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills, that is to say where a student needs the knowledge so acquired for the pursuit of a profession, trade or employment, even if no legislative or administrative provisions make the acquisition of that knowledge a prerequisite for that purpose.'

'In general, university studies fulfil these criteria. The only exceptions are certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation (*plutôt que d'accéder à la vie professionnelle*).'

But the *Blaizot* judgment implies that the principle laid down in the *Gravier* case does not apply to non-vocational education.

⁹ For example, see *Defrenne v. Sabena*, [1976] ECR 455, 480-1 (this *Year Book*, 48 (1976-7), pp. 404, 407); *Pinna v. Caisse d'Allocations Familiales de la Savoie*, [1986] ECR 1, 26-7; *Société des Produits de Maïs SA v. Administration des Douanes et Droits Indirects*, [1988] 1 CMLR 459; *Blaizot v. University of Liège* (see next footnote).

tal requirement of uniform, general application of Community law means that it is for this Court alone to decide on limitations in time to be made to the interpretation which it gives.

According to the order making the reference, the Court must rule, in this context, on whether the effect of the interpretation of Article 7 given in the judgment of 13 February 1985 mentioned above applies also to the period prior to the judgment. As the Court did not limit the effect in time of its judgment of 13 February 1985 delivered in that case, no such limitation can be made in the present judgment.

Therefore the reply to the first question must be that the interpretation of Article 7 . . . laid down by the Court in its judgment of 13 February 1985 (*Gravier*) is not limited in scope to applications for admission to vocational training courses made after the delivery of that judgment and applies also to the period before that date.¹⁰

The Court then considered the second question raised by the Belgian court.

In substance the national court's second question asks whether Community law renders inapplicable to pupils and students of other member States, who have improperly paid an additional enrolment fee, a national law depriving them of the right to obtain a refund if they did not bring legal proceedings for repayment before the judgment of 13 February 1985 was delivered.

On this subject it should be observed that the right to obtain a refund of sums received by a member State in violation of rules of Community law is the consequence and complement of the rights given to individuals by Community legislation as interpreted by the Court.

Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form laid down by the various national laws applicable thereto, the fact nevertheless remains, as the Court has consistently held . . . , that those conditions may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law.

As a legislative measure like that in question in the main action, which limits repayments to plaintiffs who instituted proceedings for repayment before the judgment of 13 February 1985, simply deprives individuals who do not fulfil this condition of the right to obtain a refund of the sums improperly paid, such a condition renders impossible the exercise of the rights conferred by Article 7 [of the] EEC [Treaty].

Therefore the national court, which has an obligation to apply Community law in its entirety and to safeguard the rights which it confers on individuals, should not apply such a provision of national law.¹¹

Therefore the reply to the second question should be that under Community law pupils and students from other member States who have been improperly obliged to pay a registration fee may not be deprived by national legislation of their right to repayment if they did

¹⁰ But this retroactive effect applies only to vocational training outside universities. In *Blaizot v. University of Liège*, [1989] 1 CMLR 57, the Court decided for the first time that *university* education could fall within the definition of vocational training, and said that this decision would not apply retroactively except in the case of students who, before the date of the *Blaizot* judgment, had begun legal proceedings for the repayment of the *minerval*. The Court gave the following reasons for its ruling—the concept of vocational training in Community law had evolved gradually; Belgium had been misled by the Commission of the European Communities into thinking that that concept did not apply to university education; and retroactive application of the *Blaizot* judgment would cause severe financial problems for universities.

¹¹ See also *Amministrazione delle Finanze dello Stato v. Simmenthal*, [1978] ECR 629, 645-6, in which the Court held that 'a national court which is called upon . . . to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means'.

not bring legal proceedings for repayment before delivery of the aforesaid judgment of 13 February 1985.

*Brown v. Secretary of State for Scotland*¹² and *Lair v. Universität Hannover*,¹³ decided by the Court of Justice of the European Communities later in 1988, provide further clarification of the legal status of students from one member State studying in another member State. In the *Brown* case, the Court said: 'The payment by a member State to or on behalf of students of tuition fees charged by a university falls within the scope of the EEC Treaty for the purposes of Article 7 thereof, but the payment of grants for students' maintenance does not', and the Court gave a similar ruling in the *Lair* case. In other words, if a member State pays the fees of students of its own nationality attending its universities, the non-discrimination principle laid down in Article 7 of the EEC Treaty will oblige it to pay the fees of students from other member States attending its universities.¹⁴ However, if a member State pays maintenance grants to students of its own nationality attending its universities, the non-discrimination principle laid down in Article 7 does not oblige it to pay maintenance grants to students from other member States attending its universities; Article 7 forbids discrimination on grounds of nationality only 'within the scope of application of this Treaty', and the Court said that assistance given to students for maintenance fell in principle outside the scope of application of the EEC Treaty—'it is . . . a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions . . . and . . . a matter of social policy, which falls within the competence of the member States in so far as it is not covered by specific provisions of the EEC Treaty'. Students from other member States who have previously worked in the State in question (or who are the children of nationals of other member States who work or have worked in the State in question) are sometimes entitled to maintenance grants under EEC Regulation 1612/68, but the Court gave a rather narrow interpretation of the relevant provisions of Regulation 1612/68 in the *Brown* and *Lair* cases.

A curious feature of the *Brown* case was that the plaintiff had dual British and French nationality. If he had applied for a maintenance grant as a British national, his application would have been rejected because he had not resided long enough in the United Kingdom. That is why he tried to claim a right to a British maintenance grant as a French national (member States of the EEC are not allowed to defeat claims to equality of treatment put forward by nationals of other member States by applying requirements of their municipal law concerning prior residence¹⁵). It is surprising that the Court was prepared to treat him as a French national. The normal rule in international law is that a dual national of State A and State B cannot claim rights as a national of State A *vis-à-vis* State B; State B is entitled to treat him as one of its own nationals.¹⁶ Sir Gordon Slynn, the Advocate General, said:

¹² [1988] 3 CMLR 403.

¹³ *The Times*, 3 September 1988, p. 61.

¹⁴ The judgments in the *Brown* and *Lair* cases suggest that this obligation applies only if the university course in question is 'vocational', as defined in the *Blaziot* case (see above, n. 8).

¹⁵ *Sotgiu v. Deutsche Bundespost*, [1974] ECR 153, 164.

¹⁶ Some cases recognize an exception to this rule, whereby the State of a dual national's master nationality may make a claim on his behalf against the State of his 'non-effective' nationality (Akehurst, *A Modern Introduction to International Law* (6th edn., 1987), p. 99), but the British Government does not recognize this exception (this *Year Book*, 53 (1982), pp. 492-3, and 54 (1983), pp. 520-1)—which makes its failure to raise the question of dual nationality in the *Brown* case all the more surprising.

The Danish government [which intervened in the proceedings before the Court] objects as a preliminary matter that as he [Brown] is a British national he cannot rely, as against the United Kingdom, on any provision of the Treaty dealing with discrimination. The United Kingdom takes no such point and apart from the brief reference in the Danish government's observations the question has not been discussed in argument. I proceed on the basis that as a French national he can claim rights as such, France being the country in which he has resided and with which, apart from the fact that he is the son of a British national, he has the closest connection.¹⁷

The Court treated him as a French national without any discussion of this point.

Extra-territorial application of anti-trust laws

*Case No. 3. Re Wood Pulp Cartel: A. Ahlström Oy and others v. Commission of the European Communities.*¹⁸ The plaintiffs in this case were Finnish, United States and Canadian companies, and an association of United States companies. All of the companies exported wood pulp to the EEC. The Commission adopted a decision¹⁹ which fined the plaintiffs for violating Article 85 of the EEC Treaty²⁰ by entering into agreements with one another (or by participating in concerted practices) to fix the prices of their exports to the EEC; some of the plaintiffs were also fined for violating Article 85 by inserting, in contracts for the sale of wood pulp, clauses prohibiting the export or re-sale of the wood pulp sold. The plaintiffs instituted proceedings for the annulment of the Commission's decision under Article 173 of the EEC Treaty.

Before examining the merits of the case, the Court decided to deal first with the question whether the plaintiffs were subject to Community law. In paragraph 79 of its decision, the Commission had justified its exercise of jurisdiction by finding that 'the effect of the agreements and practices on prices announced and/or charged to customers and on re-sale of pulp within the EEC was . . . not only substantial but intended, and was the primary and direct result of the agreements and practices'. Some of the plaintiffs argued that the 'effects doctrine' was not part of Community law and was contrary to international law.

Mr Advocate General Darmon, after a somewhat inconclusive analysis of the Court's previous case law, argued that international law permitted a State (and, by analogy, the EEC) to apply its anti-trust law to acts done by foreigners abroad if those acts had direct, substantial and foreseeable effects within the territory of the State claiming jurisdiction. He based this conclusion on broad principles enunciated by the Permanent Court of International Justice in the *Lotus* case and by Judge Fitzmaurice in the *Barcelona Traction* case, on United States anti-trust cases, on the views of various writers on international law, and on a resolution adopted by the International Law Association in 1972.

The Court, however, adopted a different approach, and held that the plaintiff

¹⁷ [1988] 3 CMLR 403, 409.

¹⁸ [1988] 4 CMLR 901.

¹⁹ Text in [1985] 3 CMLR 474.

²⁰ Article 85 (1) of the EEC Treaty prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control . . . markets . . . '.

companies were subject to Community law because they had *acted* within the EEC.²¹

It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland, and that the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the Common Market.

It follows that where those producers concert on the prices to be charged to their customers and put that concertation into effect by selling at prices which are actually co-ordinated, they are taking part in concertation which has the object and effect of restricting competition within the Common Market within the meaning of Article 85 of the EEC Treaty.

Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article 85.

The applicants have submitted that the decision is incompatible with public international law on the grounds that the application of the competition rules in this case was founded exclusively on the economic repercussions within the Common Market of conduct restricting competition which was adopted outside the Community.

It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the Common Market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

The producers in this case implemented their pricing agreement within the Common Market. It is immaterial in that respect whether or not they had recourse to subsidiaries,²² agents, sub-agents or branches within the Community in order to make their contacts with purchasers within the Community.

Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.²³

²¹ A similar difference of approach between the Advocate General (Mayras) and the Court occurred in *Imperial Chemical Industries Ltd v. Commission*, [1972] CMLR 557; see this *Year Book*, 46 (1972-3) pp. 452, 455-6.

²² The Court probably did not mean to imply that acts of subsidiary companies are invariably attributable to the parent company (one of the United States companies involved in the case was a subsidiary of a British company, but the Court treated it throughout as a United States company). Marketing goods by means of a subsidiary can take two forms. First, the subsidiary company in the EEC can merely act as an agent for its non-EEC parent company; in this situation its acts are attributable to the parent company, because contracts made by an agent are binding on the agent's principal. Second, the non-EEC parent company can sell goods to its EEC subsidiary company, which then acts independently in re-selling them; in this case, the re-sale by the subsidiary company is not attributable to the parent company, but the sale by the parent company to the subsidiary company is obviously an act done by the parent company. In the first situation the non-EEC company makes a sale in the EEC *through* its EEC subsidiary company; in the second situation the non-EEC company makes a sale in the EEC *to* its EEC subsidiary company. But in both situations the non-EEC company makes a sale *in the EEC*, and that is enough to justify the application of Article 85 of the EEC Treaty to agreements concerning such a sale.

²³ [1988] 4 CMLR 940-1.

At first sight, the Court's judgment leaves open the question whether the 'effects doctrine' is valid in Community law and international law. But the paragraphs of the Court's judgment dealing with KEA (an export association to which some of the United States plaintiff companies belonged) can perhaps be interpreted as rejecting the 'effects doctrine'. The paragraphs in question read as follows:

According to its Articles of Association, KEA is a non-profit-making association whose purpose is the promotion of the commercial interests of its members in the exportation of their products and it serves primarily as a clearing-house for its members for information regarding their export markets. KEA does not itself engage in manufacture, selling or distribution.

It should further be pointed out that within KEA a number of groups have been formed, including the Pulp Group, to cover the different sectors of the pulp and paper industry. Under Article I of the Bye-Laws of KEA, undertakings may only join KEA by becoming a member of one of those groups. Article II of the Bye-Laws provides that the groups enjoy full independence in the management of their affairs.

It should be noted that according to a policy statement adopted by the Pulp Group, referred to in paragraph 32 of the contested decision, the members of the group may conclude price agreements at meetings which they hold from time to time provided that each member is informed in advance that prices will be discussed and that the meeting is quorate. The unanimous agreement of the members present is also binding on members who are absent when the decision is adopted.

It is apparent from the foregoing that KEA's price recommendations cannot be distinguished from the pricing agreements concluded by undertakings which are members of the Pulp Group and that KEA has not played a separate role in the implementation of those agreements.

In those circumstances the decision should be declared void in so far as it concerns KEA.²⁴

The Commission and the Advocate-General regarded the Community's jurisdiction as based on the 'effects doctrine', and thought that KEA had violated Community law; that was logical, since KEA's price recommendations (even if identical with the pricing agreements concluded by undertakings which were members of the Pulp Group) must have had the effect of increasing the willingness of those undertakings to carry out such agreements, and KEA could therefore be regarded as sharing responsibility for the effects which such agreements produced within the EEC. On the other hand, the British Government, which intervened in the proceedings before the Court, argued that international law permitted the EEC to exercise jurisdiction over acts done by foreign companies only if those acts were done within the Community; the British Government drew two conclusions from this principle—the first was that the EEC had jurisdiction over the plaintiff companies because they had done things inside the Community, and the second was that the EEC had no jurisdiction over KEA because KEA had done nothing inside the Community. As we have seen, the Court shared the British Government's view that the EEC had jurisdiction over the plaintiff companies because they had done things inside the Community. It is possible that the Court also shared the British Government's view that the EEC had no jurisdiction over KEA because KEA had done nothing inside the Community; it is probably not without significance that the paragraphs of the Court's judgment which deal with KEA form part of the section of the judgment entitled: 'Incorrect assessment of the territorial scope of

²⁴ Ibid., pp. 942-3.

Article 85 of the EEC Treaty and incompatibility of the decision with public international law'. It is therefore submitted that the Court's statement that 'KEA has not played a separate role in the implementation of' its members' pricing agreements should be interpreted to mean that KEA was not subject to the jurisdiction of the EEC because KEA (as distinct from its members) had done nothing to implement those agreements within the Community.

The United States companies which were members of KEA used a different argument to attack those parts of the Commission's decision which imposed fines on them. They pointed out that their activities in KEA were authorized by the Webb-Pomerene Act of 1918 (which permits United States companies engaged in the export trade to do things which would normally violate United States anti-trust law), and they contended that the Commission's decision therefore violated what they described as the international law principle of non-interference. The Court rejected that contention.

As regards the argument based on the infringement of the principle of non-interference, it should be pointed out that the applicants who are members of KEA have referred to a rule according to which where two States have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each State is obliged to exercise its jurisdiction with moderation. The applicants have concluded that by disregarding that rule in applying its competition rules the Community has infringed the principle of non-interference.

There is no need to enquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the Webb-Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded.

It should further be pointed out that the United States authorities raised no objections regarding any conflict of jurisdiction when consulted by the Commission pursuant to the OECD Council Recommendation of 25 October 1979 concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade.²⁵

Some of the Canadian companies argued that the Commission had infringed Canada's sovereignty and breached the principles of international comity by imposing fines on them and making reduction of those fines conditional on the plaintiffs giving promises about their future conduct.²⁶ The Court rejected that argument.

As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling into question the Community's jurisdiction to apply its

²⁵ Ibid., pp. 941-2. The OECD Recommendation is printed in OECD, *Acts of the Organization*, 19, p. 377.

²⁶ The promises required the companies concerned to invoice at least 50 per cent of their sales to the Community in the currency of the buyer (previously sales had generally been concluded in dollars), to abandon the system of announcing prices on a quarterly basis and henceforth to quote prices which were to remain effective 'until further notice'. The companies concerned also promised not to impose export or resale bans on buyers of their products, and not to exchange information or disclose their prices publicly.

According to the Commission, these promises were 'likely to reduce the artificial transparency of the market and thus to improve the competitive conditions of the relevant market and to lessen the risks of future infringements'.

One of the Canadian companies argued that the Commission had infringed Canada's sovereignty over its monetary affairs by requiring a Canadian company to issue invoices in a currency other than the Canadian dollar; the Court did not reply to this particular argument.

competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected.²⁷

The Finnish plaintiffs contended that their conduct was governed exclusively by the competition rules in the Free Trade Agreement between the EEC and Finland, and not by Article 85 of the EEC Treaty. The Court rejected that contention.

It is necessary to determine whether, as the applicants maintain, Articles 23 and 27 of the Free Trade Agreement have the effect of precluding the application of Article 85 of the EEC Treaty in so far as trade between the Community and Finland is concerned.

. . . Under Article 23 (1) of the Free Trade Agreement, . . . agreements and concerted practices which have as their object or effect the restriction of competition are incompatible with the proper functioning of the Agreement in so far as they may affect trade between the Community and Finland. Under Article 23 (2), if a Contracting Party considers that a given practice is incompatible with Article 23 (1), it may take appropriate measures in accordance with the procedures laid down in Article 27. In the context of those procedures it is to consult the other Contracting Party within the Joint Committee in order to put a stop to the offending practices. If no agreement can be reached, the Contracting Party concerned may adopt safeguard measures.

. . . Articles 23 and 27 of the Free Trade Agreement presuppose that the Contracting Parties have rules which enable them to take action against agreements which they regard as being incompatible with that Agreement. As far as the Community is concerned, those rules can only be the provisions of Articles 85 and 86 of the [EEC] Treaty. The application of those Articles is therefore not precluded by the Free Trade Agreement.

It should be pointed out finally that in this case the Community applied its competition rules to the Finnish applicants not because they had concerted with each other but because they took part in a much larger concertation with United States, Canadian and Swedish undertakings which restricted competition within the Community. It was thus not just trade with Finland that was affected. In that situation reference of the matter to the Joint Committee could not have led to the adoption of appropriate measures.

Consequently the submission relating to the exclusive application of the competition rules in the Free Trade Agreement between the Community and Finland must be rejected.²⁸

Having decided that the plaintiffs (with the exception of KEA) were subject to the Community's jurisdiction, the Court assigned the case to its Fifth Chamber for consideration of the merits of the case.

MICHAEL AKEHURST

²⁷ [1988] 4 CMLR 901, 942.

²⁸ *Ibid.*, pp. 943-4. Mr Advocate General Darmon also gave other reasons for rejecting the plaintiffs' contention: *ibid.*, pp. 934-8.

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² Based on the *Model Plan for the Classification of Documents concerning State Practice in the field of Public International Law* adopted by the Committee of Ministers of the Council of Europe in Resolution (68) 17 of 28 June 1968.

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Abbreviations

- HC Debs. *Hansard*, House of Commons Debates (6th series)
- HL Debs. *Hansard*, House of Lords Debates (5th series)
- Cmnd. Command Paper (5th series)
- Cm. Command Paper (6th series)
- UKMIL *United Kingdom Materials on International Law*
- UKTS *United Kingdom Treaty Series*

Part One: II. C. International law in general—relationship between international law and municipal law—municipal remedies for violations of international law

In reply to a question, the Parliamentary Under-Secretary of State, Department of Defence, wrote:

On 17 February 1988, the British Red Cross Society drew to the attention of my Department a pamphlet and a leaflet published by the Labour Party about the National Health Service which appeared to bear the Red Cross emblem or an emblem closely resembling it. Under the terms of the Geneva conventions, Her Majesty's Government are under an obligation to take measures to prevent unauthorised use of the Red Cross emblem or any sign or designation which constitutes an imitation of it. The Geneva Conventions Act 1957 makes it an offence for

any person to use the Red Cross emblem without the authority of the Defence Council, or, without the authority of the Board of Trade, any design so nearly resembling it as to be capable of being mistaken for it. As no such authorities have been given, the matter has been referred to the Director of Public Prosecutions.

(HC Debs., vol. 128, Written Answers, col. 419 : 29 February 1988)

Part One: II. D. I. *International law in general—relationship between international law and municipal law—implementation of international law in municipal law—treaties*

(See also Part Three: II. A. 1. (c). (items of 26 July 1988), Part Four: VII. (Orders of 21 December 1988), Part Five: VIII. A. (*passim*), Part Nine: VIII. (item of 29 November 1988), and Part Fourteen: I. B. 7., below)

In the course of moving the second reading in the House of Lords of the Recognition of Trusts Bill, the Lord Chancellor, Viscount Hailsham, stated in part:

The Bill incorporates into United Kingdom law the main provisions of the convention on the law applicable to trusts and on their recognition, which was adopted in draft by The Hague Conference on Private International Law on 20th October, 1984. Your Lordships will find the text of the convention in Command Paper 9494. It was signed on behalf of the United Kingdom on 10th January, 1986.

The purpose of the convention is to establish common principles between states on the law of trusts and to deal with the most important issues concerning their recognition. The other day I referred to the fact that the common lawyers of England had invented the Franglais phrase 'infants'. The origin of 'trusts' is also English. They were, of course, part of the English system known as equity and therefore the peculiar and patented invention of a long line of deceased Lord Chancellors who brought the whole system into operation.

It follows that trusts are not, in general, a concept familiar to the civil law countries. Their systems of law are not designed to accept that one individual may hold assets on behalf of another. To give an extreme example, at present if there are trust assets in a foreign civil law jurisdiction, and the trustee incurs debts in his personal capacity, the assets of the trust are liable to be seized to meet the debts incurred by the trustee.

It was to avoid this and other difficulties that the United Kingdom promoted the negotiation by The Hague Conference of a convention which, in effect, allows us to export to civil law countries, first, the concept of a trust; secondly, our rules laying down the law which governs such a trust; and thirdly, the circumstances in which it should be recognised. The convention will thus principally be of benefit to common law countries such as England and Wales.

This Bill serves two purposes. First, it will enable the United Kingdom to ratify the convention. But, secondly, and quite independently, it will bring into force for the United Kingdom the main provisions of the convention. The convention itself will come into force only when three states have ratified it. A number of states have expressed willingness to do so, but only once the principal common law countries have taken the lead. Accordingly, this Bill will ensure that the main provisions of the convention form part of United Kingdom trust law irrespective of the date

upon which the convention itself takes effect. Thus, ratification by the United Kingdom will encourage other states to ratify and, thus, to recognise United Kingdom trusts.

(HL Debs., vol. 482, col. 939: 4 December 1986)

In moving the approval in the House of Lords of the draft European Communities (Definition of Treaties) (International Convention on the Harmonised Commodity Description and Coding System) Order 1987, the Parliamentary Under-Secretary of State, Department of Transport, Lord Brabazon of Tara, stated:

The purpose of this draft order is to declare the International Convention on the Harmonised Commodity Description and Coding System, with its Protocol of Amendment, to be Community treaties under Section 1(2) of the European Communities Act 1972.

The convention is normally known by its short title of the Harmonised System—or HS—Convention. It is the creation of the Customs Co-operation Council (CCC), the international body concerned with Customs matters. It has been designed to modernise and replace, as the basis for Customs tariffs and statistical nomenclatures, the current CCC nomenclature system which dates back to 1950. The aim of the HS Convention is to facilitate international trade, and by means of its unique coding system, the collection, comparison and analysis of international trade statistics.

The convention will come into force on 1st January 1988. Twenty-eight countries as well as the European Community are so far committed to its introduction in 1988. It forms the basis of the EC and UK Customs tariffs for 1988.

Parliament has previously had opportunities to consider the conclusion of the convention by the UK and the EC and has raised no objections. The need now to specify by means of this order as a 'Community treaty' under the European Communities Act is a separate consideration.

The House may be aware that the Joint Committee on Statutory Instruments in its Second Report of the 1987–88 Session questioned whether the order under consideration would in fact serve any useful purpose. The Government believe that the draft order is necessary for the avoidance of doubt. We have proposed that the convention should be specified because the new Customs nomenclature which it sets up will replace the current nomenclature in the Common Customs Tariff of the European Economic Community. Even if in practice individuals will normally rely on the Community legislation to be enacted to classify those products within Community competence, certain provisions of the convention itself are also of such a nature that they could be relied upon as a matter of Community law by individuals.

Tariff provisions have been frequently held by the European Court of Justice to be of this character. We therefore believe that the more cautious approach involved in making this order is well justified. It simply has the effect in layman's terms of acknowledging specifically in UK law that the convention may be regarded in Community laws as being directly applicable. I beg to move.

(HL Debs., vol. 489, cols. 294–5: 22 October 1987)

In the course of a debate on the subject of a judgment of the European

Court of Justice concerning value added tax for certain categories of spectacles, the Economic Secretary to the Treasury, Mr Peter Lilley, stated:

The United Kingdom has a treaty obligation to implement rulings from the European Court. Any amendment to United Kingdom law imposing taxation would have to be proposed to, and approved by, the House of Commons.

The hon. Gentleman asked what primary legislation would have to be changed to free us from our obligations to enforce the rulings of the European Court. That would, of course, infringe the treaty of accession, Article 171 of the treaty of Rome requires us to adopt the rulings of the European Court of Justice.

(HC Debs., vol. 128, cols. 297–8 *passim*: 24 February 1988; see also HL Debs., vol. 496, col. 821: 9 May 1988)

In the course of a debate on the subject of children abducted from the United Kingdom, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Timothy Eggar, stated:

That problem has been recognised by the international community and two conventions have recently been brought into being to remedy the problem. They are the Hague convention on the civil aspects of international child abduction and the European convention on recognition and enforcement of decisions concerning custody of children and on the restoration of the custody of children. These were implemented in the United Kingdom, when the Child Custody Act 1985 came into force, as recently as 1 August 1986.

(HC Debs., vol. 131, col. 529: 15 April 1988)

During the course of the debate in the House of Commons on the Report stage of the Criminal Justice Bill, the Minister of State, Home Office, Mr John Patten, referred in particular to the clause which became s. 134 of the Criminal Justice Act 1988 (see Part Four: VII., below). He went on:

The new clauses and amendments will enable the Government to ratify the United Nations convention on torture and other cruel, inhuman and degrading punishments, which was adopted by the General Assembly of the United Nations in 1984. The Government have been looking for some time for an opportunity to implement the convention. We did not originally intend to do it in this Bill, but the right hon. and learned Member for Warley, West (Mr. Archer) . . . spotted an opportunity in it and suggested a series of amendments giving effect to the convention. He spoke to them in Committee, and they were welcomed then. We were delighted to find that we could move forward on a sound and firm basis of all-party support.

I must make it clear to Opposition Members that neither the convention nor the new clauses and amendments will operate retrospectively. They will apply only to offences committed two months after Royal Assent. The purpose of our accession to the convention is not to instigate a sort of retrospective witch-hunt against those alleged to have committed torture in the past, and the new clauses and amendments would not make such a witch-hunt possible.

I remind the House that, as many are aware, 1988 is the 40th anniversary of the

Universal Declaration of Human Rights, and it is fitting that we should try to mark that anniversary by ratifying the UN convention on torture. If the House accepts the new clause and the Bill completes its progress as we expect it to, we should be able to ratify the convention before the end of 1988.

(HC Debs., vol. 135, col. 620: 16 June 1988)

In reply to a question, the Attorney-General wrote in part:

The European Convention on Human Rights is not part of the law of the United Kingdom; an allegation of a breach of the convention's provisions cannot therefore found a cause of action in the courts of this country.

(HC Debs., vol. 137, Written Answers, col. 212: 13 July 1988)

In reply to a question, the Secretary of State for the Home Department wrote:

When consideration is being given to legislative and other proposals full account is taken of the United Kingdom's obligations under the European convention on human rights and of any risk of challenge thereunder.

(HC Debs., vol. 137, Written Answers, col. 220: 13 July 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The consumption of live monkey brains in Hong Kong restaurants is already prohibited. Hong Kong's Prevention of Cruelty to Animals Ordinance makes acts of cruelty to animals illegal and provides powers to arrest offenders. The Animals and Plants (Protection of Endangered Species) Ordinance, which gives effect to [the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973], controls inter alia the import and possession of endangered species including all species of monkey.

(HC Debs., vol. 137, Written Answers, col. 736: 21 July 1988)

In the course of a debate on the subject of immigration, the Minister of State, Home Office, Mr Timothy Renton, mentioned s. 7(1) of the Immigration Act 1988. He went on:

The implementation of section 7(1), which concerns European Community nationals exercising their rights under the treaty of Rome, will take place as soon as we are able to bring forward an Order in Council under the European Communities Act 1972 to replace the relevant parts of the immigration rules. The preparation of the order is a complex matter. It will take some months yet.

(HC Debs., vol. 138, col. 437: 27 July 1988)

Part Two: I. Sources of international law—treaties

In reply to the question

Whether it is [Her Majesty's Government's] view that all the instruments relating to the INF Agreement, the treaty, the basing country agreements, and the exchange of notes, constitute treaties with the same status in international law, particularly given that the basing treaty agreements are not to be presented to the United States Senate for ratification,

the Minister of State for Defence Procurement wrote:

We are party to the basing country agreement of 11th December 1987 with the United States of America, the Federal Republic of Germany, Belgium, Italy and the Netherlands and the exchange of notes of 21st December 1987 with the Soviet Union, both of which constitute international treaties. The internal procedures of each party for securing approval to enable it to give its formal consent to either treaty are a matter for that party alone.

(HL Debs., vol. 493, cols. 1414–5: 25 February 1988)

Part Two: II. *Sources of international law—custom*

(See Part Five: IV. (p. 480) and Part Eleven: II. A. 7. (a). (item of 5 October 1988), below)

Part Two: VII. *Sources of international law—unilateral acts*

(See Part Nine: IV., below)

Part Two: VIII. *Sources of international law—restatement by formal processes of codification and progressive development*

In a speech in the Sixth Committee of the UN General Assembly on 2 November 1988 considering the report of the International Law Commission, the UK representative, Mr A.D. Watts, stated in part:

Mr Chairman, my remarks today will be devoted solely to the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

...
My first general comment is that I note with interest the International Law Commission's consideration of the extent to which the present topic involves the progressive development of international law rather than the codification of existing rules. The United Kingdom delegation shares the view of the Special Rapporteur that it is not necessary to decide in each case whether or not the provision in question involves progressive development. However, it is clear that to some considerable extent the draft articles do involve the progressive development of this area of international law. It seems, accordingly, to the United Kingdom delegation that the Commission should proceed in its deliberations on this topic with considerable care. In tackling a subject of some novelty, it is tempting to deal with it comprehensively, and to try to take care of all the various theoretical possibilities inherent in it. In my delegation's view, however, there is some danger in that approach. When breaking new ground, it may be better to have more limited aims, for which it may be easier to devise a generally acceptable outcome. At this stage in the development of this branch of international law, it seems to the United Kingdom delegation better to concentrate on those situations which give rise to the bulk of the practical problems which need resolution, and to refrain from attempting to grapple with those which theoretically arise but which raise issues of limited practical significance while at the same time introducing elements of disproportionate theoretical difficulty.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 6/43/SR.27, pp. 13–16)

Part Two: IX. *Sources of international law—comity*

In 1988, the European Court of Justice decided cases brought by 41 wood pulp producers, and two of their trade associations, all having their registered offices outside the Community, against the European Commission which had decided on 19 December 1984 (*Official Journal*, 1985, No. L 85, p. 1) that they were engaged in concerted practices on prices. The UK Government was given permission to intervene in the Court action in order to support the Commission in certain of the cases. The UK pleadings not having been made public (see Part Twelve: II. I. 2., below), the following extract is taken from a summary of them contained in the *Report for the Hearing* prepared by Judge-Rapporteur R. Joliet:

. . . the United Kingdom refers to the importance of the principle of comity which is generally recognized by the international community, in particular by the legal systems of the United States and the United Kingdom and by the OECD in its aforesaid recommendation. According to that principle, where a State or inter-governmental institution does not have sole jurisdiction over persons or events, it affords the other State which has jurisdiction an opportunity to make its position known. In this case, the Commission complied with that principle since it informed and consulted the States concerned before adopting its decision.

(*Re Wood Pulp Cartel: A. Ahlström Oy and others v. EC Commission*: text provided by Foreign and Commonwealth Office)

Part Three: I. A. 1. *Subjects of international law—States—international status—sovereignty and independence*

In a statement issued after the meeting of the Foreign Ministers of the five permanent members of the Security Council with the Secretary-General of the UN on 28 September 1988, it was observed:

The Ministers further reaffirmed their strong commitment to the sovereignty, independence and territorial integrity of Lebanon.

(Text provided by the Foreign and Commonwealth Office)

Part Three: I. A. 2. *Subjects of international law—States—international status—non-intervention and non-use of force*

(See also Part Four: VII. (Speech by Mr Eggar to Carnegie Council of 8 December 1988), below)

In the course of a debate on the subject of children abducted from the United Kingdom, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Timothy Eggar, stated:

Diplomacy or the work of consular officers abroad have, sadly, a limited role only in the fate of a contested child. Just as the British Government have no influence on the workings of the judiciary of the United Kingdom, so we cannot be expected to have influence on the workings of a court in a foreign country. Indeed,

it would be improper for the British Government to seek to interfere in the administration of justice in a foreign sovereign state.

(HC Debs., vol. 131, col. 530: 15 April 1988)

Part Three: I. A. 3. *Subjects of international law—States—international status—domestic jurisdiction*

(See also Part Four: VII. (Speech by Mr Eggar to the Carnegie Council of 8 December 1988), below)

In reply to the question whether Her Majesty's Government will make representations to the Government of Grenada on the treatment of Mrs Phyllis Coard in prison there, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

No. The enforcement of prison regulations, which are presently the same as those introduced by the People's Revolutionary Government of which Mrs Coard was a member, is entirely a matter for the Grenadian authorities.

(HC Debs., vol. 129, Written Answers, cols. 685-6: 18 March 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, stated:

In no way is it a responsibility of the Government to monitor all the judicial systems of the world. However, when human rights issues come to the fore, such as with the Sharpeville Six . . . I believe that the Government's stance on appealing for clemency is fully justified, and we shall maintain that.

(HC Debs., vol. 130, col. 1081: 30 March 1988)

Part Three: I. B. 1. *Subjects of international law—States—recognition—recognition of States*

(See also Part Three: I. B. 2., below)

In reply to a question, the Minister of State for Overseas Development wrote in part:

We recognise only one Republic of Cyprus.

(HC Debs., vol. 129, Written Answers, col. 427: 14 March 1988)

Part Three: I. B. 2. *Subjects of international law—States—recognition—recognition of governments*

In reply to the question whether Her Majesty's Government will acknowledge the new head of State of Panama, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

We recognise States, not Governments, in accordance with common international doctrine.

(HC Debs., vol. 128, Written Answers, col. 742: 4 March 1988)

In reply to the question when did the Prime Minister last meet a Head of Government from an illegal regime, the Prime Minister wrote:

The British Government recognise States, not Governments.
(HC Debs., vol. 131, Written Answers, col. 7 : 12 April 1988)

In reply to a question about recognition of the coalition Government of Democratic Kampuchea, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Our policy is to recognise states, not governments. We have no dealings with either of the two rival Cambodian regimes as Governments. We support the retention by the Coalition Government of Democratic Kampuchea of the Cambodian seat at the United Nations in line with the recommendations of the Credentials Committee.

(HC Debs., vol. 132, Written Answers, col. 469 : 4 May 1988; see also *ibid.*, vol. 134, Written Answers, col. 615 : 8 June 1988)

In reply to the question whether Her Majesty's Government will make it their policy 'to promote the exclusion of the Pol Pot faction of the Khmer Rouge from the United Nations', the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We see no reason to change our policy on the question of Cambodia's seat at the United Nations, which implies neither recognition of the Coalition Government of Democratic Kampuchea (we recognise only states, not Governments) nor support for the abhorrent Pol Pot.

(HC Debs., vol. 138, Written Answers, col. 967 : 19 October 1988; see also *ibid.*, vol. 139, Written Answers, col. 52 : 24 October 1988, and vol. 143, Written Answers, col. 40 : 5 December 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Since 23 September governmental authority in Lebanon has been disputed. We recognise states, not governments. While we are prepared to have contact with both sides, that does not imply that we accept the claims of either.

(HC Debs., vol. 140, Written Answers, col. 269 : 10 November 1988)

Part Three: I. B. 5. *Subjects of international law—States—recognition—non-recognition*

(See also Part Three: I. B. 2., above, and Part Three: I. E. (items of 15 April, 20 June and 29 November 1988), below)

In the course of a debate on the subject of South Africa, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

Bophuthatswana's fragmentary nature is only one reason why no country thought it right to recognise its independence. That country is financially dependent on South Africa. The very existence of Bophuthatswana is a consequence of

apartheid, and I think that that is the principal reason why recognition has not been forthcoming.

(HC Debs., vol. 126, cols. 958–9: 3 February 1988; see also items below)

In reply to a question on the subject of the UNITA organization in Angola, the Secretary of State remarked:

There is no question of our recognising such an organisation . . .

(Ibid., col. 959)

In reply to the question why Her Majesty's Government had refused a visa to the Kampuchean ambassador to Moscow, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We have no diplomatic relations nor official dealings with the PRK. Our normal policy is not to grant visas to PRK officials, although we consider every application on its merits. Hor Nam Hong is the PRK ambassador in Moscow and it would be inappropriate to issue a visa for him.

(HC Debs., vol. 128, Written Answers, col. 24: 22 February 1988)

In reply to a question, the same Minister wrote:

We withdrew recognition from the Pol Pot regime in December 1979 and have no intention of contributing to its re-establishment.

(HC Debs., vol. 128, Written Answers, col. 591: 2 March 1988; see also HC Debs., vol. 130, col. 1070: 30 March 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have not recognised de jure the incorporation of Estonia, Latvia and Lithuania into the Soviet Union, because of the way in which it was carried out.

(HC Debs., vol. 128, Written Answers, col. 599: 2 March 1988; see also *ibid.*, vol. 135, Written Answers, col. 418: 20 June 1988, and vol. 142, Written Answers, col. 184: 29 November 1988)

In reply to the question what is Her Majesty's Government's policy towards the Resistencia Nacional Moçambica, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We do not recognise RENAMO.

(HC Debs., vol. 131, Written Answers, col. 29: 12 April 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

Our position of de facto but not de jure recognition of the incorporation of the Baltic States into the Soviet Union is well-known.

(HC Debs., vol. 131, Written Answers, col. 249: 15 April 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, stated:

Bophuthatswana is part of the Republic of South Africa and we treat those who live within its boundaries accordingly.

(HC Debs., vol. 132, col. 863: 4 May 1988)

In the course of a debate on the subject of Bophuthatswana, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, stated:

Some of my hon. Friends . . . believe that the Government should recognise Bophuthatswana as an independent state. I listened very carefully to what my hon. Friends have said this evening. I hope that they will hear me out because I say this in all sincerity. I should like to see a way to change the position which is plainly seen by my hon. Friends to be unsatisfactory for the people of Bophuthatswana. However, I must recognise what lies in international law and realise what has happened through history.

History causes this Government to describe Bophuthatswana as having developed from the policy of grant apartheid initiated by Dr. Verwoerd. It was created as a key element in that policy of separate development. All the homelands in South Africa were born out of apartheid. By that they live together within their areas as if they were multiracial. However, that can be deceptive. Those who live in the homelands cannot live freely in the rest of South Africa. We must look at this very carefully and with sympathy for those who want to improve the lot of all people in South Africa, whether in the homelands or elsewhere in the republic.

This Government's policy is in line with that of the international community at large. Our policy is to oppose the design of a divided and separated South Africa. Only the South African Government think otherwise. South Africa is the only country in the world which recognises Bophuthatswana as an independent state.

I believe that there is something in the unanimity of the international community. That is a unanimity of attitude which has nothing to do with being blind to the facts or with not listening to the needs of the people. There is an anxiety about what would be imprinted for the future if Bophuthatswana were to be recognised internationally as independent. That unanimity is there for all to see.

I know that my hon. Friends who have spoken tonight are as fully opposed to apartheid in all its manifestations as they could be. The Government are fully opposed to all apartheid whether it be part of some master plan or practised—as it is regrettably still practised—in the Republic of South Africa. We cannot recognise as an independent state a homeland that is part of that master plan. Bophuthatswana does not meet the criteria for recognition as an independent state that have been followed by successive British Governments. Those criteria are based on international law.

(HC Debs., vol. 138, col. 641: 28 July 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, said:

The creation of Bophuthatswana by the South African Government was a key element in the policy of separate development, to which we are wholly opposed. In common with all other states, except South Africa, we do not recognise Bophuthatswana as independent.

(HC Debs., vol. 138, col. 872, 19 October 1988; see also *ibid.*, Written Answers, col. 958: 19 October 1988)

In reply to the question what further evidence is required by Her Majesty's Government in order to grant recognition to Bophuthatswana, the Minister of State said:

There would be consideration of such a course only if the writ of the Republic of South Africa did not run in Bophuthatswana. It does, and that country is recognised only by the Republic of South Africa.

(Ibid., col. 873)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We recognise only States: the question of recognition of the PLO does not arise. (HC Debs., vol. 139, Written Answers, col. 451 : 28 October 1988)

In explanation of vote in the UN General Assembly on 15 December 1988, the UK Permanent Representative to the UN, Sir Crispin Tickell, stated in part:

On the Resolution whose text appears in Document L.54, my Delegation's abstention does not mean that the United Kingdom has recognised the State of Palestine as proclaimed unilaterally by the Palestine National Council on 15 November 1988 in Algiers. My Delegation's abstention should not be taken to imply any change in my Government's position.

(Text provided by the Foreign and Commonwealth Office; see also A/43/PV.82, p. 83)

Part Three: I. C. 4. *Subjects of international law—States—types of States—dependent States and territories*

(See also Part Three: I. E. (item of 25 October 1988), Part Four: VII. (Criminal Justice Act 1988, s. 134), Part Eight: II. A. (item of 9 September 1987), Part Nine: IX. (item of 26 July 1988), and Part Nine: X. (item of 19 July 1988), below)

By a Note dated 25 August 1987 addressed to the Secretary-General of the UN, the UK Government referred to Hong Kong's becoming an associate member of the International Maritime Organization from 7 June 1987. The Note continued:

... having regard to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the question of Hong Kong, signed in Beijing on 19 December 1984, the United Kingdom will restore Hong Kong to the People's Republic of China with effect from 1 July 1997 and that the United Kingdom will continue to have international responsibility for Hong Kong until that date.

(UKTS No. 62 (1987); Cm. 345, p. 12)

In reply to questions, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The constitutional arrangements for Hong Kong are set out in letters patent and

royal instructions, which are issued from time to time in exercise of the royal prerogative. The Governor of Hong Kong exercises his powers in accordance with letters patent and royal instruction and any other laws in force in the colony.

Under the Falkland Islands Constitution Order 1985, the executive authority of the Falkland Islands is, subject to the constitution and any other law, exercised on behalf of Her Majesty by the governor either directly or through officers subordinate to him. The governor is obliged by the terms of the constitution to act in accordance with any instructions which Her Majesty may from time to time give him through a Secretary of State.

(HC Debs., vol. 126, Written Answers, col. 705: 4 February 1988)

In the course of a debate on the subject of Hong Kong, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated of the Sino-British joint declaration:

The two co-signatories of the joint declaration have important obligations to each other under international law. The Chinese Government have the responsibility for drafting the Basic Law—that is entirely a matter for them. The British Government, on the other hand, have a right to assure themselves that the principles embodied in the joint declaration have been faithfully implemented in the Basic Law. . . . Both sides, in addition, have a common obligation to the people of Hong Kong.

(HC Debs., vol. 137, col. 696: 15 July 1988)

Later in his speech, the Secretary of State remarked:

Let me turn for a moment to the draft Basic Law. It is a large, comprehensive document, covering virtually all the provisions of the joint declaration. Some of those provisions are included verbatim. It is important to recognise, before looking at some of the remaining areas of difficulty, that most of the text is already very much along the right lines. The main remaining areas of concern in Hong Kong have clearly emerged and are being addressed.

The first of those concerns is autonomy. The question is asked whether the Basic Law will enable the Hong Kong special administrative region to enjoy the high degree of autonomy provided for in the joint declaration. That is an entirely reasonable question to ask, but equally it must be recognised that a high degree of autonomy is not the same as independence. Sovereignty over Hong Kong will rest with China after 1997. It will require the most careful judgment to get the balance right. We believe that the joint declaration, on the whole, got this right. That is why we attach great importance to ensuring that the Basic Law accurately reflects the joint declaration in this respect. A topic that is of particular significance in this context is the relationship between Hong Kong and the National People's Congress in Beijing in legislative and judicial matters, as well as in the interpretation of the Basic Law itself.

The general questions involved here are not unique. They arise whenever there is a need to allocate power and responsibility between a central Government and a non-sovereign entity within the same state, which has a degree, even a high degree, of autonomy. This is a crucial and sensitive area. It will be vital to confidence in Hong Kong to define the relationship in a way that not only reflects the fact of

Chinese sovereignty, but properly meets the legitimate requirements and expectations of the special administrative region.

A second part of the draft that needs to be looked at closely is the guarantees of essential rights and freedoms. There is understandable concern about the extent to which the provisions in the draft designed to protect the rights and freedoms of Hong Kong people will work in practice. Once again the important thing must be to ensure that the ultimate result faithfully reflects the provisions of the joint declaration, so that Hong Kong people can be confident that they will continue to enjoy the rights and freedoms that they have today. We hope that the drafters will listen to those concerns and refine the draft accordingly.

(Ibid., cols. 698–9)

Part Three: I. E. *Subjects of international law—States—self-determination*

In the course of a speech on 9 February 1988 in the UN Commission on Human Rights discussing the right of peoples to self-determination, the UK representative, Mr H. Steel, stated:

But first . . . a word about the right to self-determination itself: what its basis is, what it signifies, what its importance is. In the 14th successive year of discussion, it would be difficult to say anything very original on these points; and I am not going to try. But there are a number of things that are worth saying each time that we discuss the matter, even though others have said them before me and have said them better.

First, the right of self-determination is not, so to speak, a derivative right, it is not one that we have managed to isolate and identify by some sophisticated process of distillation or extrapolation from other recognised human rights. Though it is now specified in each of the two International Covenants as one of the particular rights which they guarantee, its parentage is much older—older even than the Universal Declaration—for it is expressly invoked in Article 1 of the United Nations Charter, which sets out the Purposes of the United Nations, and again in Article 55 of the Charter. Those who violate it therefore strike at the very core of the world order which the United Nations represents.

Second, it is, as the Charter and the two international Covenants expressly declare, a right of peoples. Not States. Not countries. Not governments. Peoples. Many of the cases that concern us are of course cases where the violator of the right is some foreign power or authority, an invader or occupier; and it may be that these cases are, for an easily understandable psychological reason, especially offensive to us. But let us not forget that the right to self-determination, being the right by virtue of which, as Article 1 of each of the two International Covenants says, peoples 'freely determine their political status and freely pursue their economic, social and cultural development', is a right which can as easily be infringed—indeed, totally denied—by a people's own government. Unfortunately, it often is.

That is linked with the next point. The phrase that I have quoted from Article 1 of the two Covenants can perhaps be fairly summarised as the right of a people to be, and to remain at all times, in charge of its own destiny. That breaks down, in practice, into the right freely to choose its own government and its own social system and to have its government responsible to it in the full sense of that word.

From that proposition, important in itself, a number of other important things flow.

First, the right to self-determination is not something which is achieved and exhausted, once and for all, by a single act—a revolution, a Declaration of Independence or—let it be emphasised—a single election. It is a continuing right: always operative, always to be respected, always to be jealously asserted and defended.

Second, the necessary concomitant of a people's right freely to choose the government that it wants is its right freely to choose another government whenever it wants. The right of self-determination inexorably demands a democratic system under which the government is chosen from time to time by a process of free and fair elections, held on the basis of a genuinely popular suffrage. Together with this—both for its own sake and as a necessary condition of elections being free and fair—there must be a legal system which guarantees, in law and in fact, the basic human rights of freedom of expression, freedom of association, freedom of assembly and all the other related freedoms. Even in the absence of any foreign occupation or interference, and however theoretically benevolent the ruling authority may be, a people which does not enjoy such a democratic system of choosing its own government cannot, in the view of my delegation, be said to enjoy the right to self-determination. I suggest that this is a thought that the Commission could profitably bear in mind in relation to a large number of items that face us in the course of this session.

A vivid example—perhaps the example *par excellence*—of a people which is today denied the right to be in charge of its own destiny—that is to say, the right to self-determination—is the non-white population of South Africa, the vast majority of the population of that unhappy country. The system of Apartheid, which denies them any role in deciding how they should be governed or what sort of society they should live in, is the very negation of the right to self-determination. It is a system which also violates, or depends intrinsically on the violation of, a multitude of their human rights; and, quite apart from that, it is morally repulsive. But these are matters which we will take up in other contexts. In the present context there should be no doubt that the United Kingdom Government joins whole-heartedly in condemning Apartheid as a flagrant violation of the right to self-determination.

A somewhat different manifestation of the same evil is the situation in Namibia. Here, it is the maintenance of the unlawful occupation of the territory by South Africa which denies the Namibian people their right to self-determination. As one of the five Western powers who formulated the United Nations plan for the independence of Namibia, the British Government are actively engaged in efforts to ensure that Namibians will have the opportunity to determine their own future through free and fair elections under United Nations supervision and control. As we see it, this entails the withdrawal of *all* foreign troops from Southern Africa. We will therefore continue to support all the efforts that are being made to that end and the full implementation of the United Nations Plan.

When I spoke under Item 4 of our agenda, I expressed the British Government's strong support for the right of the Palestinian people to self-determination, in the context of a negotiated settlement which guarantees the right of Israel and all States within the region to secure existence within recognised borders. In whatever context that question arises our position on it is unchanged, and firm and unequivocal, and I need say no more here.

Another people which is currently being denied its right to self-determination is the people of Afghanistan. The foreign invasion and occupation which began eight years ago continues; and with it a system of unspeakably brutal repression and denial of all democratic rights—indeed, of almost all basic human rights. Some aspects of that will be before the Commission later in the Session, when we consider the Report of the Special Rapporteur. But it is the denial of the right to self-determination which I particularly want to emphasise now. . . .

I shall mention one last, unhappy, current example of the denial of the right to self-determination. Again, this is a case where that denial is being effected by foreign invasion and occupation. Just as in the case of the Soviet occupation of Afghanistan, the international community has overwhelmingly condemned, and refused to accept, the illegal and oppressive Vietnamese occupation of Cambodia, which has also now lasted for eight years. The record level of support which the resolution on this matter attracted at the recent General Assembly is a clear endorsement of the claim of the Cambodian people to be allowed to enjoy their right to self-determination. The condemnation of the actions of the Vietnam Government which was thus expressed, and which my delegation today again expresses, is not in any way to be construed as tantamount to condoning the abhorrent Pol Pot regime or the terrible abuses which it and the Khmer Rouge inflicted on the Cambodia people. That must be clearly understood. But the regime imposed and maintained by the force of Vietnamese arms is also illegitimate and unacceptable. Cambodian independence must be restored; the Vietnamese forces must withdraw, completely and without deferment or delay; and there must be free and fair elections, under United Nations auspices, to allow the wishes of the Cambodia people genuinely to determine how they shall be governed.

(Text provided by the Foreign and Commonwealth Office; see also E/CN. 4/1988/SR. 1, pp. 4–5)

In the course of a speech on 17 March 1988 in the UN Security Council on the subject of the Falkland Islands, the UK Permanent Representative to the UN, Sir Crispin Tickell, stated:

But the Argentine claim to the Falklands still stands regardless of the wishes of the islanders, and as long as it remains so we must retain the capability of dealing with the unexpected. My Government is determined to fulfil its commitments to the people of the Falklands and to uphold their right to choose by whom they wish to be governed. Indeed it is obliged to do so by the Charter and the International Covenant on Civil and Political Rights.

(S/PV. 2800, p. 17)

In reply to a question on the subject of the Palestinian problem, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated in part:

A way forward has to be found on the basis of the two principles which have been enunciated so often. They are the right of Israel and other states in the area to secure existence within recognised boundaries . . . and the right of the Palestinian people to self-determination.

(HC Debs., vol. 130, col. 1074: 30 March 1988; see also HL Debs., vol. 496, col. 373: 3 May 1988; HC Debs., vol. 134, cols. 828 and 832: 8 June 1988)

In the course of a debate on the subject of Gibraltar, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, stated in part:

Her Majesty's Government are committed to respect the wishes of the Gibraltarians on the question of sovereignty.

(Ibid., col. 1075: 30 March 1988)

In reply to the question whether the Secretary of State for Foreign and Commonwealth Affairs will raise with the Soviet Union at the review conference in Vienna the question of the self-determination of the Baltic States under Principle VIII of Basket I of the Helsinki Final Act, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We have no plans to do so. . . . Our delegation in Vienna have raised a number of human rights violations which have taken place in the Baltic States.

(HC Debs., vol. 131, Written Answers, col. 249: 15 April 1988)

In the course of replying to an oral question on the subject of Afghanistan, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated in part:

The Soviet withdrawal . . . must be followed by the best possible way of enabling the Afghan people—including the refugees—to exercise their right of self-determination and of establishing a Government acceptable to them all.

(HC Debs., vol. 132, Written Answers, cols. 878–9: 4 May 1988)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

We have consistently voted in favour of United Nations resolutions which have reaffirmed the need to adhere to the principles of the United Nations; and which call for the withdrawal of all foreign forces from Cambodia and the right of the Cambodian people to self-determination, free from outside interference.

(HC Debs., vol. 132, Written Answers, col. 469: 4 May 1988)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We have not recognised *de jure* the incorporation of Estonia, Latvia and Lithuania into the Soviet Union, because of the unacceptable way in which it was carried out. It follows that we would respect the right of these former independent states to determine their own future status in a peaceful manner, as is indeed provided for in the Soviet constitution.

(HC Debs., vol. 135, Written Answers, col. 418: 20 June 1988)

In a speech in the Fourth Committee of the UN on 25 October 1988, the UK representative, Mr S. Smith, stated in part:

Decolonisation has been one of the major success stories of the last forty years.

Many speakers have stressed this fact. It is quite right that they should. Decolonisation has shaped the modern world. Many members of this Committee would not be here were it not for decolonisation. Britain has played a major role in that process. Consider a few statistics. Almost one and a half billion people across five continents—more than one quarter of the world's population—come from countries with direct experience of British administration. Forty-nine members of the United Nations—just under one third of its present membership—were at one time administered by Britain. And when the first list of so-called non-self-governing territories was drawn up in 1946, forty-three of them—well over half the list—were under British administration. Throughout the period since then the British Government has granted the wish of the peoples of those territories for independence.

Now the position has completely changed. Only ten territories under British administration remain the concern of this Committee. Most are small. Some are tiny. But regardless of size the wishes of their inhabitants remain the guiding beacon of our policy. Our aim—which we believe has always been the underlying aim of the decolonisation process—is to ensure that the people decide for themselves what kind of political future they want—whether it be independence or some other status.

Surprisingly some members of this Committee do not appear to share that aim. Instead they have sought to imply that the process of self-determination can have only one outcome—independence. They have argued that the peoples of the remaining British dependencies have retained their links with Britain as a result of some out-moded colonialist aspiration on the part of the British Government. That, Mr Chairman, is quite untrue. The peoples of the British dependencies have retained their links with Britain because that is what *they* wish. Each territory is unique. Each has its own problems. But each also has its own democratic political structure and procedures through which the inhabitants make their own decisions—in the context of prevailing constitutional and treaty arrangements—about their future relationship with the United Kingdom. It is not for the British Government, far less for the United Nations, to tell these people what constitutional status they should choose and how and when they should change it. The pattern of the past is not necessarily the pattern of the future. There is no standard blueprint for decolonisation in British or other dependent territories. We should not seek to impose one.

Some speakers have also implied that the United Kingdom has failed in its Charter obligations to promote development and the economic, social and educational advancement of its dependent peoples. This also is untrue. The British Government takes seriously and observes scrupulously its obligations under Article 73 of the United Nations Charter.

As part of that obligation we recently conducted a review of policy towards our five Caribbean Dependent Territories and Bermuda. That review concluded that we would not necessarily urge these territories to move to independence but we remain ready to respond positively in cases where independence is the clearly and constitutionally expressed wish of the people concerned. We reaffirmed our commitment to the territories and our determination to discharge our obligations in full. As a result we are implementing a number of administrative measures to improve the effectiveness with which we discharge our obligations to ensure the good administration and economic and social development of the Dependent

Territories. There will be no change in our policy that the reasonable needs of the Dependent Territories will be a first charge on United Kingdom aid funds.

We remain responsible for external relations, defence and security of the territories. As part of that responsibility we have significantly improved the defences of the Caribbean Dependent Territories against the serious threat posed by drug trafficking and related problems as part of a wider determination in cooperation with the government of the United States and regional governments to combat the drugs threat in the region as a whole.

For Britain the colonial era is long over. Most of our former dependent territories have already chosen independence. A small number prefer to remain in close association with the United Kingdom because they feel that it is in *their* best interests to do so. They can modify their choice if they wish. That is for them to decide.

The peoples of most of the territories on the Committee's agenda, therefore, already enjoy a measure of self government which conforms to their wishes. For others, such as the people of Namibia, Western Sahara, or New Caledonia, the prospect of a solution appears to be in sight. Regrettably the Fourth Committee and its subsidiary body, the Committee of 24, have failed to keep up with these changing circumstances. Instead of applying a pragmatic and flexible approach to the remaining dependent territories, the decolonisation machine grinds on seeking to squeeze the dependent peoples into some pre-determined ideological mould. Each year first the Committee of 24 and its Sub-Committees then this Committee spend long hours in repetitive and often irrelevant debate. Each year the same tired, over-long resolutions are adopted which have no relevance to the needs and aspirations of the peoples concerned. As my delegation has repeatedly pointed out, the United Nations needs urgently to adapt its decolonisation machinery to the changes which have taken place—and which continue to take place—in the world. If not, the work of the Organisation in decolonisation will continue its descent into irrelevance and put at risk the prestige and effectiveness of the United Nations itself. That, Mr Chairman, should be acceptable to none of us.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 4/43/SR. 13, pp. 4-5)

In the course of a speech in the UN General Assembly on 17 November 1988 on the subject of the Falkland Islands, the UK Permanent Representative to the UN, Sir Crispin Tickell, stated:

The people of the Falkland Islands—and their wishes—are at the heart of the British Government's policy on this question. The Falkland Islanders form a distinct and homogeneous community. Many of their families have been settled in the Islands for five or six generations, longer than many Argentine families have lived in Argentina. I said it in last year's debate, and I repeat it now: the Falkland Islands have been British for longer than Argentina has been Argentine. This Assembly should recognise, as should the Argentines, what the Islanders have repeatedly made known through their elected representatives, most recently in the Fourth Committee last week: that they have no desire to become part of Argentina, and that they wish to remain British. Self-determination is one of the fundamental principles of the Charter of the United Nations. It is a right dear to all members of this Assembly, which we—and especially the smaller among us—ignore at our peril. The same goes for individual human rights. My country has consistently

upheld the right of self-determination and the International Covenant on Civil and Political Rights. We find it strange that they should apparently be ignored in this case.

...

Let me assure the Assembly of this central point. The British Government continues and will continue to uphold the right of the Islanders to self-determination. That is why we are not prepared to accede to calls for talks about sovereignty.

(Text provided by the Foreign and Commonwealth Office; see also A/43/PV.54, pp. 29–32)

In reply to the question whether the Baltic States are entitled to self-determination, the Minister of State, Foreign and Commonwealth Office, wrote:

... we have never recognised *de jure* the forcible incorporation of the former Baltic states into the Soviet Union and make this clear to the Soviet authorities whenever necessary. It follows that we would respect the right of the peoples of Latvia, Lithuania and Estonia to say what their own future should be. This accords with the United Nations charter and indeed, Article 72 of the Soviet constitution.

(HL Debs., vol. 502, col. 179: 29 November 1988)

Part Three: II. A. 1. (c). *Subjects of international law—international organizations—in general—legal status—privileges and immunities*

In the course of a debate in a House of Commons Standing Committee on the subject of the Arms Control and Disarmament Bill, the Minister of State, Foreign and Commonwealth Office, Mr David Mellor, stated:

... officials of the European Community enjoy privileges and immunities under the European Community's protocol on privileges and immunities. Effect was given to that protocol in the European Communities Act 1972 ...

(HC Standing Committee D, Arms Control and Disarmament Bill, col. 18: 3 November 1987)

In moving the approval in the House of Lords of the draft International Trust Fund for Tuvalu (Immunities and Privileges) Order 1987, the Government Minister, Lord Glenarthur, stated in part:

... before I cover the detail of the order itself, perhaps I can set it in context by describing briefly the circumstances leading to the establishment of the trust fund. Your Lordships will not be surprised to learn that Tuvalu (which before independence in 1978, was known as the Ellice Islands) has a very small economy and physical base, and has received considerable aid from the United Kingdom. Our aid programme has provided people to work in Tuvalu; training of Tuvaluans, both in the United Kingdom and in regional institutions; and finance for capital aid projects.

We have also provided budgetary aid. This is a direct grant to make up the deficit between the Tuvalu Government's revenue and expenditure. But it is now one of the least common forms of British aid, and has certain unsatisfactory features when it is given to an independent country. We have to make tight conditions about how it is spent and accounted for.

Budgetary aid to Tuvalu has been substantial. Until 1987, it was running between £400,000 and £500,000 a year, and consequently the Government of Tuvalu were fairly heavily dependent on it. We were therefore very pleased to join with the Governments of Australia and New Zealand—and of course with the government of Tuvalu—in negotiating the establishment of an international trust fund, income from which has now replaced it.

The trust fund was established by an agreement which was ratified by the United Kingdom on 24th July 1987, after it had been laid before Parliament. The three initial contributors, apart from Tuvalu, were ourselves, Australia and New Zealand. At current rates of exchange, the UK provided £3,327,592; Australia £3,131,851 and New Zealand £3,579,738. Since then, Japan has decided to provide £276,932 and South Korea £17,170. These original contributions are for investment, so that the income can be used to supply the recurrent needs of Tuvalu. After international tendering (from British firms among others), an Australian company has been appointed as fund manager.

Our contribution to the fund was on a once-and-for-all basis and we do not envisage contributing further to it. Our budgetary aid to Tuvalu has now ceased, although we continue to supply technical co-operation and capital aid, while funding for Tuvalu's recurrent needs is provided by way of the trust fund.

I now turn to the purpose of the present order before the House. It has a much narrower focus: first, to provide the trust fund with the legal capacity to hold and invest money, to buy and sell property and to institute legal proceedings in this country. For this purpose, the order would confer on the fund the legal capacity of a body corporate to make contracts.

The second main purpose of the order is to give exemption from all United Kingdom income tax and capital gains tax to the interest earned and the profits made on the sums which the fund holds and invests. This is to ensure that the maximum benefit from the fund goes where it should go: to the Government of Tuvalu. But I should emphasise that these financial immunities will apply only to the transactions of the fund itself; no personal privileges and immunities are provided under the order for members of the board of directors or the advisory committee of the fund.

The purposes of the order are entirely desirable and sensible. They are also in line with a requirement made by Article 5 of the agreement which stipulates that each party to the fund should accord to the fund precisely these legal privileges, immunities and status. Australia and New Zealand have already taken the necessary action to do that. Tuvalu is doing so.

(HL Debs., vol. 491, cols.1033-4: 11 January 1988)

Speaking in the House of Commons Fourth Standing Committee on Statutory Instruments considering the draft EUMETSAT (Immunities and Privileges) Order 1988 and the draft EUTELSAT (Immunities and Privileges) Order 1988, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Timothy Eggar, stated:

The European Telecommunications Satellite Organisation—Eutelsat—was created in May 1977. Its functions include the design, development, construction, establishment, operation and maintenance of the space segment of the European telecommunications satellite system or systems. Eutelsat's primary role is to pro-

vide the space segment required for international public telecommunications services in Europe. The three satellites were built by the European Space Agency and in each case British Aerospace was the prime contractor.

The primary purpose of the European Organisation for the Exploitation of Meteorological Satellites—Eumetsat—is to establish, maintain and utilise European systems of operational meteorological satellites. In doing so, it takes into account as far as possible the recommendations of the World Meteorological Organisation—a specialised agency of the United Nations.

The conventions provide that each organisation is to have privileges and immunities necessary for the performance of its functions. The United Kingdom is a party to both the Eutelsat convention and the Eumetsat convention. It has signed but not ratified the two protocols on privileges and immunities. We now want to ratify the protocols on privileges and immunities since, in the case of Eutelsat, members of the organisation have already arrived in the United Kingdom on attachments to companies.

The draft Orders in Council will, when made, enable the Government to give effect to the protocols and therefore to ratify them. The draft orders follow precedents for similar orders made in respect of other international organisations.

We are satisfied that the privileges and immunities accorded under these protocols are necessary for the effective functioning of the two organisations. They provide for officials of these organisations to have, depending on their status and functions, immunity from legal action in respect of acts done by them in the course of their duties, inviolability of official documents and papers, and immunity from United Kingdom taxation and customs duties.

Ratification would further facilitate the letting of contracts by the two organisations in the United Kingdom. They provide a source of demand for European—especially United Kingdom—manufacturers.

(HC Fourth Committee on Statutory Instruments etc., 13 July 1988, cols. 3–4)

Later in the proceedings, Mr Eggar observed:

... the privileges and immunities of international organisations were considered by the Committee of Ministers at the Council of Europe some years ago. It was generally thought that the approach that we have adopted is appropriate and will be applied throughout for members of the Council of Europe.

It is important to stress that immunity from legal processes in the United Kingdom will apply only to Eutelsat and Eumetsat officials regarding acts performed in their official capacity. It would be extremely difficult to conceive of rape or assault being performed in an official capacity, and such acts will not have immunity.

(Ibid., cols. 8–9; see also HL Debs., vol. 499, cols. 991–2: 14 July 1988)

The following Explanatory Note accompanies the EUMETSAT (Immunities and Privileges) Order 1988 (1988 No. 1298) made on 26 July 1988.

This Order confers privileges and immunities on the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT), on representatives of its Members and on its staff and experts. These privileges and immunities are conferred in accordance with the Protocol on the Privileges and Immunities of the

European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT) (Cm. 397) which was opened for signature at Darmstadt on 1st December 1986 and in accordance with Article 1(3) of the Convention for the Establishment of a European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT) (Cmnd. 9203), as corrected by a Procès-Verbal of Rectification signed at Berne on 17th October 1984 (Cmnd. 9483). The Order revokes the EUMETSAT (Legal Capacities) Order 1985 (S.I. 1985/750). It will enable Her Majesty's Government to give effect to the Protocol and will come into operation on the date on which the Protocol enters into force in respect of the United Kingdom.

The following Explanatory Note accompanies the EUTELSAT (Immunities and Privileges) Order 1988 (1988 No. 1299) made on 26 July 1988.

This Order confers privileges and immunities on the European Telecommunications Satellite Organisation 'EUTELSAT', on representatives of its Parties and its Signatories and on its staff members and experts. These privileges and immunities are conferred in accordance with the Protocol on the Privileges and Immunities of the European Telecommunications Satellite Organisation (EUTELSAT) (Cm. 305) which was opened for signature at Paris on 13th February 1987 and in accordance with Articles IV and XVII of the Convention on the European Telecommunications Satellite Organisation 'EUTELSAT' (Cmnd. 9069). The Order revokes the EUTELSAT (Immunities and Privileges) Orders 1984 (S.I. 1984/1980). It will enable Her Majesty's Government to give effect to the Protocol and will come into operation on the date on which the Protocol enters into force in respect of the United Kingdom.

Part Three: II. A. 2. (c). *Subjects of international law—international organizations—in general—participation of States in international organizations—obligations of membership*

In reply to a question about the United Kingdom's budgetary contribution to intergovernmental organizations, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The policy of this Government is identical to that of its predecessors: to meet our obligations to international organisations in full and on time. Assessed United Kingdom contributions are usually determined by reference to a pre-set scale of assessment which varies from one organisation to another. Voluntary contributions are determined by the Minister concerned.

For the international financial institutions, such as the World Bank group, the regional development banks and the International Fund for Agricultural Development, we seek equitable burden-sharing in the capital stock of each institution and in the soft fund replenishments.

Budgetary matters are discussed with other countries as appropriate.

(HC Debs., vol. 132, Written Answers, col. 312: 29 April 1988; see also *ibid.*, cols. 580-1: 5 May 1988)

In reply to the question whether Her Majesty's Government had made an assessment of its membership of international organizations, the Parlia-

mentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

United Kingdom membership of the majority of international organisations is naturally governed by international law but subject to these constraints our position is under continuous review.

(HC Debs., vol. 134, Written Answers, col. 616: 8 June 1988)

The Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, made the following observation in a speech to the UN General Assembly on 28 September 1988:

Each one of us is committed, bindingly committed, to the Charter of the United Nations: not just to words on a page, but to fundamental principles of justice and international law.

(A/43/PV. 8, p. 61)

Part Three: II. A. 3. *Subjects of international law—international organizations—in general—legal effect of acts of international organizations*

In reply to the question in what circumstances are resolutions of the General Assembly of the United Nations not binding on member States, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Generally the power of the General Assembly is limited to making recommendations. In certain specific cases, however, it is authorised by the United Nations Charter to make decisions binding on the member states—for example, approval of the budget (under article 17) and admission of new members (under article 18).

(HC Debs., vol. 128, Written Answers, cols. 23–4: 22 February 1988)

In reply to a question on the subject of a United Nations prohibition on the import of uranium from Namibia, the Minister of State for Defence Procurement, Lord Trefgarne, stated:

. . . I am afraid that decree number one of the United Nations Council for Namibia was made outside the competence of the General Assembly which set up that particular Council. Therefore we regard it as null and void.

(HL Debs., vol. 493, col. 1044: 23 February 1988; see also HC Debs., vol. 131, Written Answers, cols. 297 and 383: 18 and 19 April 1988)

In reply to a later question on the same subject, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated:

On the United Nations Council Decree No. 1, we do not recognise the claim of the United Nations Council for Namibia to be the legal administering authority for Namibia. We consider that the United Nations General Assembly acted beyond its competence in establishing the council. Therefore the council's Decree No. 1 does not impose any obligations on the United Kingdom.

(HL Debs., vol. 494, col. 1028: 14 March 1988; see also HL Debs., vol. 495, col. 92: 22 March 1988)

In reply to a question on the subject of Security Council Resolution No. 598, concerning the Iran/Iraq war, the Minister of State, Foreign and Commonwealth Office, stated in part:

. . . it is a fact, . . . that Resolution 598 is mandatory and it is underpinned by the unity of the five. It has been adopted unanimously; it must be obeyed and it remains the best basis for a negotiated settlement. We must therefore move to measures to enforce implementation . . .

(HL Debs., vol. 494, col. 1034: 15 March 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have played a leading role as a permanent member of the Security Council to bring about a negotiated settlement to the Iran-Iraq conflict. We shall continue to do our utmost to support the United Nations Secretary General in his work to reach a settlement via United Nations Security Council resolution 598 and in such follow-up measures as may be necessary to achieve compliance with this mandatory resolution.

(HC Debs., vol. 132, Written Answers, col. 311: 29 April 1988)

Part Three: II. B. 1. *Subjects of international law—international organizations—particular types of organizations—universal organizations*

In reply to the question whether Her Majesty's Government intends to continue membership of the United Nations, the Minister of State, Foreign and Commonwealth Office, wrote:

Yes. The United Kingdom was one of the founders of the United Nations, was a prime architect of its charter, and is a permanent member of the Security Council. We seek to make maximum use of the United Nations to promote the peaceful settlement of disputes, to preserve international peace, to further international co-operation, to protect human rights and to spread the rule of international law.

(HL Debs., vol. 493, col. 488: 15 February 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The United Kingdom has always opposed moves to suspend South African membership of the International Atomic Energy Agency because of the importance we attach to the principle of universality for United Nations technical agencies.

(HC Debs., vol. 139, Written Answers, col. 216: 26 October 1988; see also *ibid.*, vol. 142, Written Answers, col. 293: 30 November 1988)

Part Three: III. D. *Subjects of international law—subjects of international law other than States and organizations—mandated and trust territories, Namibia*

(See also Part Three: II. A. 3. (items of 23 February and 14 March 1988), above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have not been represented at conferences of the United Nations Council for Namibia, which we do not recognise.

(HC Debs., vol. 131, Written Answers, col. 383: 19 April 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We believe that the South Africans should end their unlawful occupation of Namibia. We remain committed to Namibian independence on the basis of United Nations Security Council resolution 435 and without preconditions. We support efforts by the United Nations Secretary General and the United States Administration to secure the implementation of resolution 435.

(HC Debs., vol. 132, Written Answers, col. 464: 4 May 1988)

Part Three: III. F. *Subjects of international law—subjects of international law other than States and organizations—miscellaneous*

In the course of a debate in the UN General Assembly on 29 February 1988 considering the report of the Committee on Relations with the Host Country, the representative of the Federal Republic of Germany stated:

I have the honour to speak in this debate on behalf of the 12 States members of the European Community.

With regard to the matter under discussion the Twelve reiterate their position: they fully share the views already expressed by both the Secretary-General of the United Nations and the United States Secretary of State, Mr George Shultz, to the effect that the United States is under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters. They therefore supported resolution 42/210 B adopted by the General Assembly at its forty-second session.

The Headquarters Agreement is binding under international law, and the Twelve urge the host country to abide by its international legal obligations and not to implement its legislation in a way that would prevent the discharge of the official functions of the PLO Observer Mission to the United Nations. At the very least, the host country should settle this matter through the procedure set out in section 21 of the Headquarters Agreement and therefore agree to the request of the Secretary-General to enter formally into the dispute settlement procedure and consent to the establishment of an arbitral tribunal.

We expect that the present arrangements for the PLO Observer Mission will not be curtailed or otherwise affected pending a decision by the arbitral tribunal.

The Twelve express their hope that this matter can still be resolved in a way which corresponds to the Headquarters Agreement and would allow the PLO Observer Mission to establish and maintain premises and adequate functional facilities, and would enable the personnel of the Mission to enter and remain in the United States to carry out their official functions.

(A/42/PV. 101, pp. 51-2)

In explanation of vote in the UN General Assembly on 30 November 1988, the UK Permanent Representative to the UN, Sir Crispin Tickell, stated in part:

I wish to make clear that in the view of the British Government Mr Yasser Arafat, Chairman of the Executive Committee of the Palestine Liberation Organisation, should have been allowed to come to the United Nations Headquarters in New York. This is the legal obligation of the United States. My delegation endorses the opinion given on this matter by the United Nations Legal Counsel.
(A/43/PV.65, p. 47)

Part Four: V. *The individual (including the corporation) in international law—statelessness, refugees*

(See also Part Four: VI. (item of 17 March 1988), below)

During a debate in the House of Lords on the third reading of the Immigration Bill, the Minister of State, Home Office, Earl Ferrers, stated:

The noble Lord, Lord Hylton, referred to *refoulement*. He explained, rightly, that under the United Nations Convention on Refugees signatory states are prohibited, except under certain special circumstances, from sending a refugee who has demonstrated a well-founded fear of persecution back to the country in which he may be prosecuted.

I was shocked when the noble Lord said that the assurances which my noble friend Lord Windlesham gave during his distinguished period at the Home Office, and even such remarks that I have made, have been flouted. He said that the United Kingdom is flouting the convention. I am surprised at that. The United Kingdom most emphatically does not practise *refoulement*. We carry out our obligations under the convention. That is a totally different matter from returning to his own country a person who comes here but who does not qualify for refugee status.

There must be a qualification for refugee status. That is different from returning to a third country an applicant who had already found safety. Every signatory state must retain the right to take such action if it is to distinguish between the deserving applicant, whom we all wish to see looked after, and the undeserving applicant.

The United Kingdom meticulously carries out its obligations under the [UN Convention on Refugees, 1951]. The fact that we have granted refugee status to more than 8,000 people since 1979, as well as—let us remember this—allowing a further 7,000 to stay although they did not qualify for refugee status, demonstrates that we operate that policy fairly.

(HL Debs., vol. 495, cols. 1660–1: 21 April 1988)

With regard to a new policy towards Vietnamese boat people coming to Hong Kong, the Secretary of State for Foreign and Commonwealth Affairs wrote:

The overwhelming majority of the new arrivals are ethnic Vietnamese. Most come from North Vietnam and have no family links outside Vietnam. They cannot be described as political refugees as defined by UNHCR. Their prospects for resettlement in the West are virtually non-existent. It was clear to me that Hong

Kong could no longer offer itself to this stream of people as a transit point to a future that does not and cannot exist.

(HC Debs., vol. 135, Written Answers, col. 121: 14 June 1988)

Part Four: VI. *The individual (including the corporation) in international law—immigration and emigration, extradition, expulsion and asylum*

(See also Part Five: VIII. A. (item of 4 May 1988), and Part Eight: II. D. (item of 8 February 1988), below)

In reply to questions, the Attorney-General wrote:

A total of 20 warrants, issued in respect of six persons, have been submitted to the Irish authorities since the date of entry into force of the Irish Extradition (Amendment) Act 1987.

17 of those 20 warrants, issued in respect of four of those six persons, are covered by section 44A of the Irish Extradition Act 1965 (added by section 2(1) of the Extradition (Amendment) Act 1987), which relates to directions to be given by the Irish Attorney-General concerning the backing of warrants.

One warrant, covered by section 44A, is to be withdrawn, the person in respect of whom it was issued having returned of his own volition to the United Kingdom.

The requirements for the backing of warrants in the Republic of Ireland are laid down in part III of the Irish Extradition Act 1965, the Extradition (European Convention on the Suppression of Terrorism) Act 1987 and the Extradition (Amendment) Act 1987. Under the last mentioned Act, I understand that the Irish Attorney-General is required to give a direction that certain warrants for the arrest of a fugitive shall not be backed for execution by the Garda Síochána unless he is of the opinion that there is a clear intention to prosecute or to continue the prosecution of the fugitive and such intention is founded on the existence of sufficient evidence. The Government have been concerned that these new provisions now inserted into the Irish Extradition Act 1965 would present impediments to extradition from the Irish Republic. (That Act before this amendment had effectively reciprocated the provisions of the relevant United Kingdom legislation, contained in the Backing of Warrants (Republic of Ireland) Act 1965.) The Government made those concerns known to the Irish Government when the terms of the amending legislation were first intimated. In particular, the Government were concerned that they might lead to a requirement that the Irish courts be furnished with the actual evidence supporting any warrant submitted for backing in the event of a challenge to the execution of such warrant. The Government considered, and still consider, that seriously damaging consequences for the intended criminal proceedings in the United Kingdom could follow if that were to occur.

I have notified my counterpart in the Irish Republic that I am entirely willing to provide him in each instance with a note from me confirming that the United Kingdom prosecuting authorities had considered the evidence, as they are required to do; that they were satisfied that it was sufficient to found a prosecution; and that there was a settled intention to prosecute accordingly. I have also agreed to his request that I provide him in each instance with a note setting out the relevant law.

I had hoped that these particulars would be sufficient to satisfy the requirements of the new Irish legislation, but the Irish Attorney-General has indicated that this is not the case. In these circumstances, I am considering with the Irish

Attorney-General what practicable steps can yet be taken to secure the important mutual objective of enabling extradition between our two countries to proceed effectively.

(HC Debs., vol. 127, Written Answers, cols. 685-6: 18 February 1988; see also HC Debs., vol. 130, Written Answers, col. 486: 30 March 1988)

In reply to a question, the Minister of State, Home Office, wrote in part:

There is no obligation under the United Nations convention on refugees to monitor the treatment of unsuccessful asylum seekers after return to their country of origin, and we have no mechanism for doing so.

(HC Debs., vol. 129, Written Answers, col. 653: 17 March 1988)

During the report stage of the Immigration Bill in the House of Lords, the Government spokesman, Earl Ferrers, proposed the following new clause:

Members of diplomatic missions

At the beginning of subsection (3) of section 8 of the principal Act (exemption from immigration control for members of diplomatic missions etc) there shall be inserted the words 'Subject to subsection (3A) below,' and after that subsection shall be inserted—

'(3A) In the case of a member of a mission other than a diplomatic agent (within the meaning of the said Act of 1964) subsection (3) above shall apply only if he enters or has entered the United Kingdom—

(a) as a member of that mission; or

(b) in order to take up a post as such a member which was offered to him before his arrival;

and references in that subsection to a member of a mission shall be construed accordingly.'

Earl Ferrers then stated:

. . . it may be for the convenience of your Lordships if I speak to Amendments Nos. 1 and 18 together.

The amendment to Section 8(3) of the 1971 Act is being proposed to address an area of actual and potential abuse. I apologise for introducing this amendment at a fairly late stage in the Bill, but we are anxious to take this opportunity to deal with a problem.

The problem arises from the fact that at present Section 8(3) of the Immigration Act of 1971 confers exemption from immigration control on all members of a mission within the meaning of the Diplomatic Privileges Act 1964, together with members of their family forming part of the household. This extends to all locally-engaged staff; that is to say, someone who has come to this country for another purpose and has been taken into employment by a mission. But locally-engaged staff are not generally accorded any other form of diplomatic immunity or privilege.

Immunities and privileges are not granted to locally-engaged staff if they are permanently resident in the United Kingdom. In effect, the Foreign and Commonwealth Office considers all locally-engaged staff to be permanently resident unless it receives formal notification from the mission to confirm that an individual is only

temporarily resident and that he intends to depart when his employment in the United Kingdom finishes. In practice, at present all locally-engaged staff are exempt from immigration control, while virtually all enjoy no other form of immunity or privilege.

This exemption is exploited by people who seek to prolong their stay in this country when they would not otherwise qualify to do so. There is scope for abuse in two ways. First, missions may employ people who are already in the United Kingdom as illegal entrants, or on temporary admission, or as overstayers. This employment places the person concerned beyond immigration control. He cannot be deported; nor can he be made subject to the immigration legislation. In effect, such a person can stay in the United Kingdom for so long as he remains employed by the mission.

Secondly, missions may be used as safe havens by prospective overstayers. An immigrant awaiting the outcome of an appeal against a refusal to vary his stay can join the staff of a mission and remain there even after his appeal has failed. He cannot then be deported. The control can also be frustrated by those who could otherwise be in breach of no-employment conditions, that is, people who are admitted as visitors or students, for example.

We are not concerned here with those who are appointed as full diplomatic agents. The problem relates to those who take up administrative and technical posts or service staff such as chauffeurs or caretakers. These are the positions that are the subject of the proposed amendment.

The effect of the new clause will be that locally-engaged staff in these non-diplomatic posts and their families, will no longer be exempt from immigration control. Missions will continue to be able to employ locally-engaged staff in these categories provided that their immigration status enables them to take employment. It may also be possible for others to be employed in these categories, but only if the mission notifies the Foreign and Commonwealth Office of their appointment in accordance with the Vienna Convention on Diplomatic Relations. The Foreign and Commonwealth Office will then need to be satisfied that the individual is in *bona fide* employment and is entitled to immunities and privileges.

The proposed amendment puts into practice the advice which was given to missions by the Vice Marshal of the Diplomatic Corps that they should not employ people who would not otherwise be permitted to work in the United Kingdom.

The proposed amendment would not apply retrospectively. Those already employed by missions would retain their exemption from immigration control while they remain in that capacity. These arrangements will be fully explained to missions before the amendment comes into effect. The proposed consequential amendment to Clause 11 will provide for the amendment to Section 8(3) to be brought into effect by means of a commencement order.

(HL Debs., vol. 495, cols. 979–80: 12 April 1988)

Part Four: VII. *The individual (including the corporation) in international law—protection of human rights and fundamental freedoms*

(See also Part Three: I. A. 3. (item of 30 March 1988) and Part Three: I. C. 4. (item of 15 July 1988), above, and Part Five: VIII. A. (item of 28 June 1988) and Part Fourteen: I. B. 8., below)

In commencing a lengthy account of the implementation by the USSR and the Eastern European countries of the provisions of the Helsinki Final Act, the Minister of State, Foreign and Commonwealth Office, wrote:

During the last six months to 31 December 1987, Soviet and East European implementation of their Helsinki commitments continued to carry special significance in the light of the third CSCE follow-up meeting currently under way in Vienna. Overall, compliance with CSCE commitments continued to be unsatisfactory, with persistent breaches of the provisions relating to human rights and fundamental freedoms, although the record varied from country to country.

(HC Debs., vol. 125, Written Answers, col. 285: 13 January 1988; see also HL Debs., vol. 492, cols. 975-9: 1 February 1988)

In the course of a speech on 11 February 1988 in the UN Commission on Human Rights on the subject of racism in South Africa, the UK representative, Mr H. Steel, stated:

South Africa is not, of course, the only country where racial discrimination and other violations of human rights occur. But, as others have stressed, it has this unique feature. It is the only country where racial discrimination is institutionalised at every level. In its every aspect, the South African system offends against the United Nations Charter and the Universal Declaration. Nor does it stop there. It is not simply that apartheid is itself a violation of human rights—though it certainly is. The enforcement of apartheid necessarily leads to further violations of human rights: detention without charge or trial; restrictions on freedom of expression; police brutality; and many other equally obnoxious practices. The United Kingdom Government has consistently condemned apartheid and the oppressive measures used to enforce it.

(Text provided by the Foreign and Commonwealth Office; see also E/CN. 4/1988/SR. 15, pp. 6-7)

In the course of a speech in the UN Commission on Human Rights on 16 February 1988, the UK alternate representative, Ms E. Young, stated:

The promotion of human rights is one of the purposes of the United Nations, under the Charter which binds us all. There is nothing more fundamental to the success of the endeavours of the United Nations in any field than the protection and promotion of human rights. For there can be no lasting security or sustained economic and social progress without respect for human rights.

...
The United Nations machinery for the promotion and protection of human rights has been built up with care over many years. We must ensure that we take no action which might inadvertently damage a system which is undoubtedly one of the most successful areas of United Nations activity.

As foreseen in Article 68 of the Charter, this Commission is the focal point of human rights activities in the United Nations. In its early years, the Commission's main task was the establishment of international standards and instruments. Central to this purpose was the elaboration of the International Bill of Human Rights, the Universal Declaration and the two International Covenants to which the Universal Declaration led. This International Bill of Human Rights, together with the

related instruments which have been elaborated over the years, constitutes an integral system which is the essential framework for protection of the individual through respect for all his rights.

(Text provided by the Foreign and Commonwealth Office)

In the course of a speech on 17 February 1988 in the UN Commission on Human Rights, the UK representative, Mr H. Steel, stated:

First, then, the Covenants. The United Kingdom Government regards the two International Covenants, together with the Universal Declaration, as together constituting the corner-stone of the grand structure of instruments which make up the United Nations Code of Human Rights. In the field of human rights, the Covenants represent both an inspiring embodiment of the values which all members of the international community hold dear—or should hold dear—and, more concretely, an authoritative enumeration and definition of the legal norms with which it is right that all States should agree to comply.

My Government therefore attaches great importance to the widest possible adherence to the Covenants, not merely by routine acknowledgements, however sincere these may be, of their moral value and authority but by explicit and definitive acceptance of the Covenants as legally binding treaties—treaties which impose legal obligations upon States, which confer legal rights on human beings and which enable the international community, through the appropriate machinery in each case, to monitor the performance of those obligations and the enjoyment of those rights. We therefore urge once again that States which have not yet done so should consider ratifying or acceding to the Covenants as soon as possible. We also urge that the greatest possible support should be given to the Human Rights Committee established under the Civil and Political Covenant and to the Economic, Social and Cultural Committee which has been established to monitor the implementation of the other Covenant. It is important that these two Committees should have all the resources that they need to fulfil their tasks and also that States should conscientiously furnish them with the information and materials which they are entitled to receive under their respective instruments.

In the same context, I must repeat what my delegation has said so many times about the vital importance of providing these two treaty-monitoring Committees with summary records of their proceedings. We think it no exaggeration to say that that is an essential facility for them. It is a facility which brings benefits in all directions. It makes the Committees themselves more cost-effective; it enables them to build up an essential corpus of case law over the years; it provides a repertory of practice and expertise which new members of each Committee—and, for that matter, experienced members also—can draw on and which is also available to interested non-members; and, not least of all, it makes it easier for individuals to gain a greater knowledge of their rights and of the mechanisms open to them to prevent or secure redress for the violation of their rights.

So much for the Covenants. The other topic on which I want to say a few brief words today is the general topic of economic, social and cultural rights and, connected with that, the specific question of the right to development.

First, I want to dispose of any misconception that may still remain that the United Kingdom Government does not really accept the concept of economic, social and cultural rights or that it regards them as of an inferior order to civil and

political rights. No such misconception *should* remain after all that my delegation has said on this matter but, in case it does, I want to make the position crystal-clear. Our acceptance of, and our allegiance to, these rights is equal to that of any delegation here. What we do say—and this is both vitally important in our eyes and perhaps the source of any genuine misconception—is that both kinds of rights are rights of individuals, and human beings: they are not rights of Governments or countries or States or of any other corporate or collective entity of that kind. To some delegations that distinction may be unwelcome, or it may seem unreal or irrelevant. To us it is very real, very relevant and very important. I would ask all other delegations here to understand that so that we may have a fruitful meeting of minds on this topic.

Connected with this, as I have said, is our attitude to the concept of the right to development. Our inclination is to see this as being, when truly analysed, not an independent and autonomous right (whose theoretical source would indeed be hard to identify) but rather the working-out—perhaps a synthesis, a coming-together would be a better description—of various rights that are themselves guaranteed by the provisions of the two International Covenants. It is therefore, like the rights from which it derives, essentially a right of human beings, of individuals: it is not a right of States or Governments.

(Text provided by the Foreign and Commonwealth Office; see also E/CN.4/1988/SR.23, p. 9)

In a speech in the UN Commission on Human Rights on 23 February 1988, the UK Representative, Mr H. Steel, stated:

The entry into force in June last year of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was an important step forward. It is particularly encouraging that the Convention, which has now been ratified by 28 States, came into force only a little over two years after it had been opened for signature. That is clear evidence of the will of the international community that this evil phenomenon should be eradicated. The United Kingdom signed the Convention shortly after it was opened for signature, and we shall ratify it as soon as the technicalities of legislation—for example, conferring extra-territorial jurisdiction on our courts—can be completed.

(Text provided by the Foreign and Commonwealth Office; see also E/CN.4/1988/SR.32, p. 6)

In the course of a speech in the same Commission on 4 March 1988, Mr Steel remarked:

All of us must remain deeply disturbed by the human rights situation in Iran. I repeat once more, on behalf of my Government, that Iran is bound to respect all the provisions of the Universal Declaration, the International Covenants, and the other human rights instruments to which it is a party. This is not a matter of policy or choice: it is a matter of solemn obligation. As the Special Representative makes clear in his report, international law cannot tolerate a selective approach to legal obligations. We call on the Iranian Government, to acknowledge and observe all its obligations, in particular those under the International Covenant on Civil and Political Rights.

(Ibid.; see also E/CN.4/1988/SR.47, p. 7)

He later stated:

We urge the Romanian Government to comply with its legal undertakings under both International Covenants.

(Ibid.; see also E/CN.4/1988/SR.47, p. 8)

In reply to the question whether Her Majesty's Government proposes to accede to the optional protocol to the International Covenant on Civil and Political Rights, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated:

. . . we have no plans to do so. We have accepted the optional articles of the European convention on human rights which recognise both the right of individual petition and the compulsory jurisdiction of the European Court of Human Rights. We do not believe that becoming a party to the optional protocol would enhance the protection of individual rights in this country.

(HL Debs., vol. 495, col. 591: 28 March 1988)

He was then asked the following question:

. . . as the United Kingdom has ratified the International Covenant on Civil and Political Rights, should we not also ratify the optional protocol, which enables the human rights committee of the United Nations to examine claims from private individuals, from wherever they may be made, that they are the victim of violation of the rights set out in the covenant? Is it not the case that several states which are party to the European convention are also party to the optional protocol? As a general principle, therefore, should not all instruments of international law be ratified by member states of the United Nations?

Lord Glenarthur replied:

I certainly understand the force of that argument. However, we believe that our acceptance of the optional articles of the European convention provides better protection than the optional protocol. Indeed, the machinery of the European convention is binding upon those who sign it, whereas the optional protocol would not be. It is of course true that other countries have made the link and ratified the optional protocol, but I cannot speak for them.

(Ibid.)

In reply to questions on the subject of the imprisonment of Palestinians by Israel, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated:

. . . we have made clear, in the United Nations and elsewhere, our view that the Israeli authorities should respect international law and human rights standards in their administration of the occupied territories. We shall continue to take appropriate opportunities to do so.

. . .
Deportation is contrary to international law and will only create new martyrs to the Palestinian cause and fuel resentment.

. . .
We believe that implementation of Security Council Resolution 242 remains the main goal to be achieved. As part of the proposal the Israelis should withdraw from

the territories occupied since 1967 and meanwhile should administer its occupation in compliance with international law and human rights standards.

(HL Debs., vol. 495, col. 1142: 14 April 1988; see also HC Debs., vol. 134, Written Answers, col. 613: 8 June 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Romanian authorities are aware of the concern in the United Kingdom about human rights in Romania. We have raised these issues in ministerial contacts. In a speech at the CSCE follow-up meeting in Vienna on 15 April, I drew attention in particular to religious rights and those of national minorities in Romania. We hope that the Vienna meeting will result in improved respect for the rights of national minorities, in Romania as elsewhere.

(HC Debs., vol. 134, Written Answers, col. 464: 7 June 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We have had to protest twice to the Czechoslovak Government about violent police actions. We are concerned about Czechoslovakia's failure to honour all its commitments in the field of human rights.

(HC Debs., vol. 134, Written Answers, col. 617: 8 June 1988)

In reply to a question, the Attorney-General wrote in part:

The European Court of Human Rights has delivered 22 judgments since 1979 in cases concerning the United Kingdom (excluding article 50 judgments, which concern damages and costs), of which the details are as set out:

<i>Date of judgment</i>	<i>Name of case: subject matter</i>	<i>Outcome</i>
13 August 1981	Young, James and Webster (closed shop)	Breach of Article 11.
22 October 1981	Dudgeon (homosexuality: Northern Ireland)	Breach of Article 8.
5 November 1981	X (mental patient: right to have detention reviewed)	No breach of Article 5(1). Breach of Article 5(4).
25 February 1982	Campbell and Cosans (corporal punishment in state schools: respect for parents' philosophical convictions)	No breach of Article 3. Breach of Article 2 of Protocol No. 1.
25 March 1983	Silver (prisoners' correspondence)	Breach of Articles 6(1), 8 and 13.
28 June 1984	Campbell and Fell (prison visitors; conduct of disciplinary proceedings)	Breach of Article 6 in two respects and of Articles 8 and 13. No breach of Article 6 on the other points at issue.

<i>Date of judgment</i>	<i>Name of case: subject matter</i>	<i>Outcome</i>
2 August 1984	Malone (telephone tapping)	Breach of Article 8.
28 May 1985	Ashingdane (detention of mental patient)	No breach of Article 5(1), 5(4) or 6.
28 May 1985	Abdulaziz, Cabales and Balkandali (immigration: discrimination on grounds of sex)	Breach of Articles 13 and 14 in one respect. No other breach of Article 13 or 14. No breach of Article 3 or 8.
21 February 1986	James (leasehold reform)	No breach of Article 1 of Protocol No. 1, or of Articles 6(1) and 13.
8 July 1986	Lithgow (aircraft and shipbuilding nationalisation)	No breach of Article 1 of Protocol No. 1, or of Article 14, 6(1) or 13.
17 October 1986	Rees (transsexual)	No breach of Article 8 or 12.
26 October 1986	AGOSI (forfeiture by customs)	No breach of Article 1 of Protocol No. 1.
24 November 1986	Gillow	Breach of Article 8 in one respect. No breach of Article 8 in other respects, or of Article 6 or 14.
2 March 1987	Weeks (parole)	No breach of Article 5(1). Breach of Article 5(4).
2 March 1987	Monnell and Morris (criminal appeals)	No breach of Article 5(1), 6(1), 6(3)(c) or 14.
8 July 1987	O (child care)	Breach of Article 6(1). No breach of Article 8.
8 July 1987	H, W, B, R (child care)	Breach of Articles 6(1) and 8.
27 April 1988	Boyle and Rice (prisoners' correspondence and visits)	No breach of Article 13. Breach of Article 8 in respect of one letter.

(HC Debs., vol. 137, Written Answers, cols. 211-14: 13 July 1988)

During a debate on the subject of prisoners of conscience in the Soviet Union, the Minister of State, Foreign and Commonwealth Office, Mr William Waldegrave, stated:

The Soviet Union, like the United Kingdom, is a signatory of the United Nations covenant on civil and political rights, and of the Helsinki Final Act. In signing those documents, it accepted certain responsibilities concerning the attitude of a state to its citizens. Among them is a pledge to respect 'human rights and fundamental freedoms, including the freedom of thought, conscience, religion

or belief'. Yet experience has shown that the Soviet authorities have failed lamentably to observe this pledge in practice.

We have every right to be concerned about that. The Final Act was agreed by states working together as equals, and it has equal significance for each of them; there is no escaping this fact. When we deal with the Soviet Union as an equal, we expect it to honour commitments freely entered into, as we do.

The Soviet Union has no grounds for special pleading. It cannot claim that the commitment to respect human rights and fundamental freedoms somehow applies less to it than to others. Article 52 of the Soviet constitution guarantees freedom of conscience to Soviet citizens. If the Soviet Union wants to be taken seriously as a responsible interlocutor in the community of nations, it must be prepared to behave like one, and to face criticism if it does not.

(HC Debs., vol. 138, cols. 830-1: 29 July 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

. . . we regret the denial of basic human rights wherever they occur. We are aware of reports of such abuses in Iraq, Iran and Turkey, and continue to take every suitable opportunity to voice our concern. My hon. and learned Friend raised this when he visited Iraq in February. When . . . the Secretary of State for Foreign and Commonwealth Affairs met the Iraqi Foreign Minister in March, he reiterated our concern about such violations, and the plight of Iraqi Kurds in particular. We have also protested vigorously about the use of chemical weapons on the civilian town of Halabja in Iraqi Kurdistan.

No recent representations have been made to the Turks about the Kurds, but . . . the Secretary of State for Foreign and Commonwealth Affairs did raise the issue of human rights in general when he met the Foreign Minister on 13 July during President Evren's visit.

Although no specific representations about the Kurds have been made to Iran, we have made known our views on human rights abuses in Iran on a number of occasions, and have co-sponsored resolutions on this issue at both the United Nations General Assembly and the United Nations Commission for Human Rights.

(Ibid., Written Answers; cols. 717-18: 29 July 1988)

On 21 September 1988, the Ambassadors of the UK, Federal Republic of Germany, Italy, France and the Netherlands delivered the following statement to the Ministry of Foreign Affairs in Rangoon, Burma:

On behalf of governments of member States of the European Community here represented we must protest in the strongest terms at the renewed killing of unarmed demonstrators in defiance of respect for human rights.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We attach great importance to the observance of human rights commitments. We take every suitable opportunity of raising abuses of human rights, both in

general terms and in relation to individual cases where appropriate, with the Governments concerned.

. . . the Secretary of State for Foreign Affairs last raised such issues in meetings with his counterparts in Eastern Europe as follows:

Romania:	November 1987 in London
Czechoslovakia:	June 1987 in London
Bulgaria:	September 1987 in London
GDR:	November 1986 in London
Poland:	December 1987 in London

In addition, he wrote to the Romanian Foreign Minister in September this year about the human rights implications of Romania's rural redevelopment programme ('systematisation').

Hungary's human rights record, though not faultless, is good by comparison with its neighbours. We have not had cause to raise human rights issues in recent ministerial contracts.

(HC Debs., vol. 138, Written Answers, cols. 961-2: 19 October 1988)

In a speech in the Sixth Committee of the UN General Assembly on 25 November 1988, the UK representative, Mr A. Aust, referred to the Draft Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment. He went on:

The United Kingdom delegation is very pleased to support the adoption of the Body of Principles for the protection of all persons under any form of detention or imprisonment. Many years of toil have produced a valuable addition to the international texts on human rights. Unfortunately, breaches of human rights occur all too often when people are detained or imprisoned. The Body of Principles will serve as important further guidance to governments on the proper treatment of persons who are deprived of their liberty. The United Kingdom is particularly gratified that this year agreement was reached on broadening the scope of the Body of Principles to cover all persons under any form of detention or imprisonment, whether or not they are held in connection with a crime.

Although not contained in a legally binding instrument, it would be a rash government which acted inconsistently with the Body of Principles. Departure from the Body of Principles could only be justified where there is a compelling reason, such as a need to protect the human rights of others. For our part, we believe that our law already conforms to the Body of Principles in all essential respects.

(Text provided by the Foreign and Commonwealth Office; see also A/C. 6/43/SR. 48, p. 3)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have repeatedly expressed our concern for the treatment of the Kurdish community in Iraq and the need to respect their human rights.

(HC Debs., vol. 142, Written Answers, col. 66: 25 November 1988; see also *ibid.*, vol. 144, Written Answers, col. 75: 19 December 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We already take every opportunity to press the Soviet Government, both bilaterally and multilaterally, to implement in full their international commitments (particularly those contained in the Helsinki Final Act) and to issue exit visas to all those who wish to leave the Soviet Union. Mr. Gorbachev's visit to the United Kingdom from 12–14 December will be a further opportunity to do so.

(HC Debs., vol. 142, Written Answers, col. 109: 28 November 1988)

On the occasion of the Special Session of the UN General Assembly to commemorate the 40th anniversary of the Universal Declaration of Human Rights on 8 December 1988, the Twelve States members of the European Community made the following statement:

The Community and its member States wish to join with the world community today in celebrating the fortieth anniversary of the Universal Declaration of Human Rights.

The Twelve States members of the European Community reaffirm their deep commitment to the respect, protection and further promotion of human rights, which they consider a corner-stone of European co-operation and security and an essential element in their relations with third countries, as the Foreign Ministers of the Twelve pointed out in their joint statement of 21 July 1986.

On this occasion, the Twelve States members of the European Community, while rejoicing at the noteworthy progress made in this field during these 40 years, cannot but regret the persistent world-wide violations of human rights and fundamental freedoms. Regarding this question the Twelve expressed their concern, in unequivocal terms, in their recent statement in the Third Committee of the United Nations General Assembly at its forty-third session. Today we reconfirm that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. We reaffirm that, with the adoption of the Universal Declaration and the subsequent human rights treaties, the protection of human rights and fundamental freedoms has become an essential duty of the international community, as well as of each of its members, which exceeds national boundaries and surpasses the principle of non-interference in domestic affairs. We firmly believe that the implementation of the universally accepted standards of human rights as laid down in the Universal Declaration of Human Rights and made binding to States parties by the International Covenants on Civil and Political Rights, as well as by the International Covenant on Economic, Social and Cultural Rights, of 1966, should be a primary task of all States. We avail ourselves of this opportunity to reiterate our devotion to the concept of human rights, which defines the relationship between the State and the individual where the latter is the beneficiary. The Twelve States members of the European Community urge all Governments to become party to the international treaties on the protection of human rights and fundamental freedoms, and stress the importance of efficient international supervisory bodies that are established to ensure effective monitoring of implementation and respect for the commitments undertaken by the States parties.

(A/43/947)

On 8 December 1988, in a speech in the Special Session of the UN General Assembly to commemorate the 40th anniversary of the Universal Declaration of Human Rights, the Parliamentary Under-Secretary for Foreign and Commonwealth Affairs, Mr Timothy Eggar, stated:

The twentieth century saw some of the cruellest acts of barbarism and tyranny by governments against their citizens. Yet before the founding of the United Nations such issues were hardly on the international agenda. It is one of the central achievements of the United Nations, in its relatively short history, that human rights abuses, wherever they occur, are now established firmly as a matter of legitimate international concern.

The Charter, and in particular the Universal Declaration, made the demand by individuals for political, economic and social rights not simply a claim by citizens against their own governments but a claim against all governments. Concern for human rights became universal.

Such is the achievement of the Universal Declaration, elaborated in the covenants which flowed from it on civil and political, and on economic and social rights. . . .

Some governments do not welcome criticism either from inside or outside their territory. We reject totally the assertion, still, regrettably, sometimes heard, that such concern constitutes unwarranted interference in internal affairs. Thanks to the legal instruments to which I have referred it is incumbent on governments to demonstrate to the international community that their human rights records are in accord with the international obligations to which they have subscribed.

Most recently we have seen the adoption of a Torture Convention, a major achievement for the international community. Nothing can be more deplorable than a system which allows prisoners to be tortured, be it to extract a confession or to satisfy the whims of the oppressors.

I am pleased to say that the practice of torture disappeared from British prisons many decades ago. The legal processes to allow us to ratify are now complete. I am therefore pleased to announce that we deposited our instrument of ratification on 8 December 1988 . . . We will play our part in ensuring that the Torture Committee works effectively to eliminate torture globally.

(Text provided by the Foreign and Commonwealth Office; see also A/43PV.74, pp. 36–8)

In the course of a speech to the Carnegie Council on 8 December 1988, Mr Eggar stated:

The Universal Declaration, proclaimed on 10 December 1948, was first a symbol of the determination of governments to protect human rights worldwide. It reflected the aspirations of the founders of the United Nations itself. Secondly it asserted a vital and new principle: that the international community has a shared responsibility to promote respect for human rights. It removed from governments the excuse that comment on internal repression is 'interference', although sadly we still hear versions of that phrase far too often today. It also placed responsibility on the international community to ensure that debate on human rights questions is responsible and universal: that we do not simply single out those whom it is politically congenial for us to criticise, but remain true to the principles which lie behind the declaration.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate on the subject of human rights, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated:

Many of your Lordships have referred to the 40th anniversary of the Universal Declaration of Human Rights which we celebrated on 10th December. I too should like to pay tribute to this declaration, particularly in the context of this debate, since for the past four decades the declaration has been of fundamental importance to the international community's efforts to promote respect for human rights.

. . .

The Universal Declaration was first a symbol of the determination of governments to protect human rights world-wide. It reflected the aspirations of the founders of the United Nations itself. Secondly, it elaborated a vital and new principle: that the international community has a shared responsibility to promote respect for human rights. It removed from governments the excuse that external comment on internal repression in other countries is interference, though sadly we still hear versions of that phrase far too often today. For the first time, on 10th December 1948, the Universal Declaration of Human Rights set standards which were recognised universally, and against which all nations are judged.

To demonstrate the importance which we attach to the Universal Declaration, we have marked the occasion of its 40th anniversary in a number of ways to which I should like briefly to refer. Most important, we introduced agreed amendments to the Criminal Justice Bill earlier this year which allowed us to ratify the United Nations convention against torture and other cruel, inhuman and degrading treatment or punishment. My honourable friend the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs himself deposited the instrument of ratification with the United Nations Secretary General on 8th December shortly before addressing the special session of the United Nations General Assembly which met in New York on that day to celebrate the anniversary. We will play our part in helping to ensure that the committee against torture works effectively to eliminate torture globally.

(HL Debs., vol. 502, col. 1005: 14 December 1988)

The Extradition (Torture) Order 1988 (Statutory Instrument 1988 No. 2247) and the Criminal Justice Act 1988 (Torture) (Overseas Territories) Order 1988 (Statutory Instrument 1988 No. 2242) were made on 21 December 1988 and entered into force on 7 January 1989. Explanatory notes accompanying the respective Orders read as follows:

This Order applies the Extradition Acts 1870 to 1895 so as to make extraditable the offence described in section 134 of the Criminal Justice Act 1988 and an attempt to commit such an offence, in the case of States Parties to the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10th December 1984 with which extradition treaties are in force.

This Order extends sections 134 and 135 of the Criminal Justice Act 1988, subject to modifications, to the territories specified in Schedule 2 hereto.

The purpose of those sections is to give effect to provisions of the United

Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10th December 1984.

[*Editorial note*: Section 134 of the Criminal Justice Act 1988, enacted on 29 July 1988, reads as follows:

TORTURE

134.—(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if—

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence—

(i) of a public official; or

(ii) of a person acting in an official capacity; and

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

(3) It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.

(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.

(5) For the purposes of this section 'lawful authority, justification or excuse' means—

(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(b) in relation to pain or suffering inflicted outside the United Kingdom—

(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and

(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.

(6) A person who commits the offence of torture shall be liable on conviction on indictment to imprisonment for life.]

The Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, sent the following letter, dated 23 December 1988, to the

Secretary-General of the UN. A letter in similar terms was sent on the same day to the Secretary-General of the Council of Europe.

I have the honour to refer to Article 4 of the International Covenant on Civil and Political Rights and to inform you that the Government of the United Kingdom hereby notify the other States Parties to the Covenant, in accordance with Article 4(3), that they have found it necessary to take and continue measures derogating in certain respects from their obligations under Article 9 of the Covenant.

There have been in the United Kingdom in recent years campaigns of organised terrorism connected with the affairs of Northern Ireland which have manifested themselves in activities which have included repeated murder, attempted murder, maiming, intimidation and violent civil disturbance and in bombing and fire raising which have resulted in death, injury and widespread destruction of property. As a result, a public emergency within the meaning of Article 4(1) of the Covenant exists in the United Kingdom. The emergency commenced prior to the ratification by the United Kingdom of the Covenant and legislation has from time to time been promulgated with regard to it.

The Government found it necessary in 1974 to introduce and since then, in cases concerning persons reasonably suspected of involvement in terrorism connected with the affairs of Northern Ireland, or of certain offences under the legislation, who have been detained for 48 hours, to exercise powers enabling further detention without charge, for periods of up to five days, on the authority of the Secretary of State. These powers are at present to be found in section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 and Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984.

Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 provides for a person whom a constable has arrested on reasonable grounds of suspecting him to be guilty of an offence under Section 1, 9 or 10 of the Act, or to be or to have been involved in terrorism connected with the affairs of Northern Ireland, to be detained in right of the arrest for up to 48 hours and thereafter, where the Secretary of State extends the detention period, for up to a further five days. Section 12 substantially re-enacted Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1976 which, in turn, substantially re-enacted Section 7 of the Prevention of Terrorism (Temporary Provisions) Act 1974.

Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984 (SI 1984/417) and Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 (SI 1984/418) were both made under Sections 13 and 14 of and Schedule 3 to the 1984 Act and substantially re-enacted powers of detention in Orders made under the 1974 and 1976 Acts. A person who is being examined under Article 4 of either Order on his arrival in, or on seeking to leave, Northern Ireland or Great Britain for the purpose of determining whether he is or has been involved in terrorism connected with the affairs of Northern Ireland, or whether there are grounds for suspecting that he has committed an offence under Section 9 of the 1984 Act, may be detained under Article 9 or 10, as appropriate, pending the conclusion of his examination. The period of this examination may exceed 12 hours if an examining officer has reasonable grounds for suspecting him to be or to have been involved in acts of terrorism

connected with the affairs of Northern Ireland. Where such a person is detained under the said Article 9 or 10 he may be detained for up to 48 hours on the authority of an examining officer and thereafter, where the Secretary of State extends the detention period, for up to a further five days.

. . .

In its judgment of 29 November 1988 in the case of *Brogan and Others*, the European Court of Human Rights held that there had been a violation of Article 5 (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on the 4th of November 1950 in respect of each of the applicants, all of whom had been detained under Section 12 of the 1984 Act. Article 5 (3) of that Convention provides that 'everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article' (which deals with lawful arrest or detention effected for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so) 'shall be brought promptly before a judge or other officer authorised by law to exercise judicial power . . .'. In addition, the Court held that there had been a violation of Article 5 (5).

Following this judgment, the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government were examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view.

Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge, for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. In so far as these measures may be inconsistent with Article 9 (3) of the Covenant, the United Kingdom hereby gives notice that it has derogated from its obligations under that provision.

(Text provided by the Foreign and Commonwealth Office)

Part Five: IV. *Organs of the State—diplomatic agents and missions*

(See also Part Eleven: II. A. 6. (item of 6 July 1988), below)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

I am not aware of any country, other than the United Kingdom, which does not issue diplomatic passports to its diplomatic staff overseas.

(HC Debs., vol. 125, Written Answers, col. 345: 14 January 1988)

The following Note, dated 28 March 1988, was sent by the Vice Marshal of the Diplomatic Corps to the Heads of Diplomatic Missions and International Organizations in London:

The Vice Marshal of the Diplomatic Corps presents his compliments to Their Excellencies the Heads and Acting Heads of Diplomatic Missions and International Organisations in London and has the honour to draw to their attention the Regulations concerning the import, acquisition, possession and use of firearms in the United Kingdom.

The Vice Marshal of the Diplomatic Corps wishes to remind the Diplomatic Corps of the very grave view taken by the United Kingdom authorities if the Regulations are not observed. Any breach would normally lead to a request for the withdrawal of the offender from the staff of the Mission or Organisation.

Responsibility for protection of Missions and Organisations and their staff rests with the United Kingdom authorities. Firearms Certificates are not granted either to Diplomatic Missions for weapons for use by security staff, or to individual members of the Missions for weapons which are intended for personal protection. It is against the law for firearms to be held without the appropriate certificate. It is the duty of the police to prevent the unauthorised carriage of firearms and persons suspected of carrying a firearm are likely to be questioned.

Similarly, responsibility for protection of visitors rests with the United Kingdom authorities. The Vice Marshal would be grateful if Missions would ensure that all visitors, as well as travellers in transit, are made aware of the Regulations in order to avoid embarrassment with the authorities at ports of entry/departure.

Weapons carried by VIP visitors, diplomats or protection officers must be declared on arrival. Travellers in transit should be made aware that if weapons are to be transferred from one aircraft to another these, too, must be declared on arrival in order that the transfer of the weapons can be facilitated without delay. It is illegal for firearms to be held by passengers without authority in the transit areas, or in any part of the United Kingdom airport. It is also an offence under Section 4 of the Aviation Security Act 1982 for weapons to be carried without authority in the cabin of British registered aircraft (whether the aircraft is in the United Kingdom or not) or in any other aircraft operating from United Kingdom airports.

The relevant provisions of the current Regulations governing the issue of Firearms Certificates for sporting purposes are set out in the Annex attached.

The Annex read as follows:

DESCRIPTION OF UK FIREARMS REGULATIONS GOVERNING ACQUISITION AND POSSESSION OF FIREARMS FOR SPORTING PURPOSES (FIREARMS ACT 1982)

Paragraph 24 of the Foreign and Commonwealth Office Memorandum on Diplomatic Privileges and Immunities has been amended as follows:—

All members of a Mission must comply with the requirements of the Firearms Act 1968, by obtaining:

- (a) Firearms Certificates in respect of any arms and ammunition (apart from smooth bore guns with a barrel not less than 24 inches in length);

- (b) Shotgun Certificates in respect of smooth bore guns with a barrel not less than 24 inches in length;
- (c) Firearms Certificates in the case of certain replica (imitation) firearms:

which they possess or intend to acquire by purchase or importation. The Firearms Act 1982 extends the provision of Section 1 of the Firearms Act 1968 to certain imitation firearms. Applications for all types of certificates may be made to A4, Firearms Branch, The Metropolitan Police, New Scotland Yard, Broadway, London SW1H 0B9 (Tel No: 01-230 2597). Payment of the fee chargeable is waived on the issue of such certificates to diplomatic agents and administrative and technical staff. Certificates will *not* be issued in respect of firearms which are intended for personal protection.

(Texts provided by the Foreign and Commonwealth Office)

The following affidavit was sworn on 3 May 1988 in the *Matter of an Application for Judicial Review between The Queen v. Secretary of State for Foreign and Commonwealth Affairs, ex parte A.C. Samuel*, in the Queen's Bench Division, High Court of Justice, Crown Office No. 342/88:

I, Donald Alexander MacLeod of Protocol Department of the Foreign and Commonwealth Office, Old Admiralty Building, The Mall, London SW1, MAKE OATH AND SAY as follows:—

1. I am the Head of Protocol Department in the Foreign and Commonwealth Office, Old Admiralty Building, The Mall, London SW1, and I am duly authorised by the Secretary of State to make the affidavit on his behalf. The matters hereinafter deposed to are within my personal knowledge or within knowledge derived from the Foreign and Commonwealth Office's files of papers on this matter.

2. The premises to which this judicial review relates are at 21 Avenue Road, London, NW8, and 26-30 Townshend Road, London NW8. The said land was owned by the Royal Government of Cambodia and was used by the Royal Government of Cambodia and its successors until 22 September 1975 as a Diplomatic Mission. The said land has not been occupied by representatives of the Government of Cambodia since 22 September 1975 and ceased to be used as a Diplomatic Mission on or about that date. From 1975 to 1979 Her Majesty's Government had only sporadic communications with the various Governments of Cambodia. Since 1979, Her Majesty's Government have had no dealings with any authority as the Government of Cambodia (see below).

3. Under Article 1(i) of the Vienna Convention on Diplomatic Relations which has the force of law in the United Kingdom by virtue of Section 2(1) of the Diplomatic Privileges Act 1964, the 'premises of the mission' are described as 'the buildings or parts of the buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the Mission including the Residence of the Head of the Mission'. Since no representatives of the State of Cambodia have occupied or used the said land since September 1975 and thus the said land is not 'used for the purposes of the mission', the Foreign and Commonwealth Office have taken the view for many years that the said land can no longer be regarded as 'the premises of the Mission' as defined in Article 1(i) of the Vienna Convention. This view was expressed to the Government of the State of Cambodia in a Note dated 29 March 1977. The State of Cambodia did not contest this view.

4. Under Article 45 of the Vienna Convention on Diplomatic Relations (which also has the force of law in the United Kingdom by virtue of section 2(1) of the Diplomatic Privileges Act 1964, because it was added to Schedule 1 to the said Act of 1964 by Section 6 of, and paragraph 1 of Schedule 2 to, the Diplomatic and Consular Premises Act 1987), there is a requirement that if diplomatic relations are broken off between two States, or if a Mission is permanently or temporarily recalled, the receiving State 'must respect and protect the premises of the mission' together with its property and archives. In the view of the FCO, this requirement to respect and protect the premises of a Mission must necessarily refer to former diplomatic premises, that is buildings which were once but are no longer used as the 'premises of the mission', because the obligation in Article 45 only applies if 'diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled', and once this has happened the premises will of necessity no longer be 'used for the purposes of the mission' and thus will no longer meet the conditions set out in Article 1(i) of the Vienna Convention.

5. When the Cambodian Government was overthrown in 1975, and the new regime headed by Pol Pot was established, the then members of the Cambodian Embassy in London did not apparently wish to serve the new regime and handed the keys of the Embassy to the Foreign and Commonwealth Office. The British Government subsequently recognised the Pol Pot Government, but resident Diplomatic Missions were not established. After the Vietnamese invasion of Cambodia in 1978, the British Government subsequently in 1979 withdrew its recognition of the Pol Pot Government and since then the British Government have not dealt with any authority as the Government of Cambodia. Accordingly, although diplomatic relations have never been specifically broken, the Foreign and Commonwealth Office take the view that the withdrawal of recognition of the Cambodian Government meant that diplomatic relations were no longer possible and thus that Article 45 of the Vienna Convention on Diplomatic Relations would apply.

6. The Foreign and Commonwealth Office believe that the British Government has an obligation to 'respect and protect' the land at 21 Avenue Road/26-30 Townshend Road on behalf of the State of Cambodia. This view is also reinforced by the fact that the then representatives of the State of Cambodia handed over the keys to the Foreign and Commonwealth Office when they vacated the premises on 22 September 1975 and requested the Foreign and Commonwealth Office to look after the said land.

7. For this purpose, the Foreign and Commonwealth Office have, from September 1975 to the present date, made periodic visits to the said land and at the period when the premises were unoccupied took steps to maintain its security by changing the locks on the property and replacing broken windows etc. On one of these regular visits on 11 August 1976, the representative of the Foreign and Commonwealth Office found the said land occupied by a group of squatters. It appeared from discussion with a representative of the squatters and from certain papers found on the premises that they had moved on 6 August 1976. The said papers are exhibited here as 'DAM 1'. Although the Foreign and Commonwealth Office is not aware whether any of the original squatters from August 1976 is still in occupation of the said land, there is a possibility that this is the case. If this were so, there would be a possibility that in August this year one or more of the squatters might be able to claim title of the said land by adverse possession. The Foreign and Commonwealth Secretary considers that to have allowed such a claim to succeed

would place the United Kingdom in breach of its international obligations towards the State of Cambodia.

8. Under the Diplomatic and Consular Premises Act 1987, the Foreign and Commonwealth Secretary may apply Section 2 of the Act to land which he has formerly accepted as diplomatic or consular premises, but did not accept as such premises immediately before the coming into force of this Section. The said land was accepted formerly by the Secretary of State as diplomatic premises; this is witnessed for example by its listing in the London Diplomatic Lists of the time before 1976 and by the granting by Her Majesty's Government of relief from rating and other taxation in accordance with Article 23(1) of the Vienna Convention on Diplomatic Relations. As set out above, however, when the land ceased to be used by representatives of the State of Cambodia for the purposes of a Diplomatic Mission, the said land was no longer accepted as diplomatic premises. In conformity with this view the Secretary of State has certified under Section 1(7) of the Diplomatic and Consular Premises Act that the said land is not now and was not at the time of the making of the Order diplomatic premises. A copy of the said certificate is now produced as exhibit 'DAM 2'. The said land was therefore not so accepted by the Secretary of State immediately before Section 2 of the Diplomatic and Consular Premises Act came into force on 1 January 1988. Under Section 2(8) of the Diplomatic and Consular Premises Act, the Secretary of State may only exercise his power under Section 2(1) of that Act with regard to land formerly accepted as diplomatic or consular premises, but not accepted as such premises immediately before the coming into force of the Section, within two months of the Section coming into force. The Section came into force on 1 January 1988 by virtue of the Diplomatic and Consular Premises Act 1987 (Commencement No. 2) Order 1987 (SI 1987 No. 2248 (C 68)). In accordance with the requirements of this Section, the Secretary of State made an Order on 4 January 1988 to apply Section 2 of the Diplomatic and Consular Premises Act to the said land. This Order is the Diplomatic and Consular Premises (Cambodia) Order 1988 (SI 1988 No. 30). The Order was laid before Parliament on 15 January 1988 for forty days during which it was subject to annulment by resolution by either House of Parliament as provided for in Section 2(4) of the Diplomatic and Consular Premises Act. No such resolution was adopted and the forty day period expired on 23 February 1988.

9. Under Section 3(2) of the Diplomatic and Consular Premises Act, the Secretary of State is obliged to pay the residue of the proceeds of sale of the premises, after deduction of the sums mentioned in paragraphs (a) to (e) of that Section, 'to the person divested of the estate or interest' (in this case the Royal Government of Cambodia). This obligation is, however, subject to Section 3(3) of that Act, which provides that: 'Where a State was divested but there is no person with whom Her Majesty's Government of the United Kingdom has dealings as the Government of that State, the Secretary of State shall hold the residue until there is such a person and then pay it.' In this case, Section 3(3) will apply and the residue of the proceeds of sale will be held in an interest-bearing account (in accordance with Section 3(4)) until there is a Government with whom Her Majesty's Government has dealings as the Government of Cambodia. It is accordingly clear that in due course the Government of Cambodia will receive the residue of the proceeds of sale, with interest.

10. In making the Diplomatic and Consular Premises (Cambodia) Order 1988, the Secretary of State had before him a statement of whether his action was

permissible under international law prepared by the Foreign and Commonwealth Legal Advisers. On the basis of this, the Secretary of State was satisfied that to make this Order was permissible under international law. A copy of this statement is exhibited as 'DAM 3'.

11. In making the Order, the Secretary of State also took into account all material considerations. He was in particular fully aware that the said land was occupied by squatters, since it was the occupation of the said land by squatters which had given rise for concern in the first instance, and which motivated the recommendation that an Order should be made under Section 2 of the Diplomatic and Consular Premises Act. The squatters were occupying the property illegally and had no property rights. In the view of the Foreign and Commonwealth Office, they therefore had no right to be consulted, nor any legitimate expectation of being consulted. Had the Secretary of State not made an Order under Section 2 of the Act, the United Kingdom would have been in breach of its obligations under the Vienna Convention on Diplomatic Relations.

12. On 30 March 1988, the Secretary of State made use of the power given to him by the Diplomatic and Consular Premises (Cambodia) Order and vested in himself, in accordance with Section 2(5) of the Diplomatic and Consular Premises Act, the said land by Deed Poll. This Deed Poll was registered at the Land Registry on 8 April 1988. Copies of the said Deed Poll and Land Certificate are exhibited and are now produced and marked 'DAM 4' and 'DAM 5'.

13. Under Section 3 of the Diplomatic and Consular Premises Act, when the Secretary of State has vested land in himself in the above manner, it is his duty to sell it as soon as it is reasonably practicable to do so, taking all reasonable steps to ensure that the price is the best that can be reasonably obtained. For this reason, the Secretary of State considers that the premises must be sold with vacant possession. The property's value would be [much] reduced if the squatters were still in occupation. The Secretary of State has accordingly had issued and served a summons for vacant possession, but pursuant to his undertaking given to Mr Justice Nolan, he will not seek a hearing on this summons [until the] outcome of the present judicial review is known.

14. Under Section 3(2) of the Diplomatic and Consular Premises Act, once a property has been sold, the Secretary of State is required to apply the purchase money to the payment of various liabilities in connection with the land. Section 3(2)(d) provides for the 'discharge of such liabilities to pay rates or sums in lieu of rates or on any other land as the Secretary of State thinks fit'. No decision has yet been made by the Secretary of State on whether any rates or sums due in lieu of rates will be paid from the proceeds of the sale. The Secretary of State respectfully but firmly asserts that it has been no part of his purpose in using his powers under the Act to secure the payment of rates on the said land. The Secretary of State is using the powers conferred upon him by the Diplomatic and Consular Premises Act for the purpose of fulfilling his obligations under International Law.

Document DAM 2, referred to in paragraph 8 of the above affidavit, read as follows:

DIPLOMATIC AND CONSULAR PREMISES ACT 1987 CERTIFICATE

I, Timothy John Crommelin Eggar, Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, acting under the authority of the Secretary of

State and in accordance with section 1(7) of the Diplomatic and Consular Premises Act 1987 ('the Act of 1987'), hereby certify that:—

- (a) the Secretary of State accepted the land known as 21 Avenue Road, London, NW8, and 26/30 Townshend Road, London, NW8 ('the said land') as diplomatic premises before 22 September 1975;
- (b) the Secretary of State does not now, and did not immediately before 1st January 1988 (the date of the coming into force of section 2 of the Act of 1987 in accordance with the Diplomatic and Consular Premises Act 1987 (Commencement No. 2) Order 1987 (S.I. 1987 No. 2248)), accept the said land as diplomatic premises for the purposes of section 1(2) of the Act of 1987; and
- (c) the Secretary of State has not at any time given his consent to the said land being diplomatic premises for the purposes of section 1(1) of the Act of 1987.

28 April 1988

Document DAM 3, referred to in paragraph 10 of the above affidavit, read as follows:

CAMBODIAN PREMISES IN ST. JOHN'S WOOD POSITION IN INTERNATIONAL LAW

1. Under section 2(2) of the Diplomatic and Consular Premises Act 1987 (the '1987 Act'), the Secretary of State may only provide for section 2 to apply to premises 'if he is satisfied that to do so is permissible under international law.'

2. The Cambodian premises in St. John's Wood are no longer 'used for the purposes of the mission' within the meaning of Article 1(i) of the Vienna Convention on Diplomatic Relations ('the Vienna Convention') and thus do not enjoy the special status, especially inviolability, provided for in Article 22 of the Vienna Convention.

3. The only other relevant provision in the Vienna Convention is Article 45 which provides:

'If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled;

- (a) the receiving State must, even in case of armed conflict respect and protect the premises of the mission, together with its property and archives'.

4. When the Cambodian Government was overthrown in 1975, and the new regime headed by Pol Pot was established, the then members of the Cambodian Embassy in London apparently did not wish to serve the new regime and handed the keys of the Embassy to the FCO. The British Government subsequently recognised the Pol Pot Government, but resident diplomatic missions were not established. After the Vietnamese invasion in 1978, the British Government subsequently in 1979 withdrew its recognition of the Pol Pot Government and since then the British Government has not dealt with any person or body as the Government of Cambodia. Accordingly, although diplomatic relations have never been specifically broken, it can be argued that the withdrawal of recognition of the Cambodian Government meant that diplomatic relations were no longer possible and thus that Article 45 would apply.

5. Under Article 45 of the Vienna Convention the British Government has an obligation to 'respect and protect' the premises in St. John's Wood, which can only be fulfilled by the action which is proposed: the alternative would be for the squatters to obtain title to the premises, which could indeed be said to be a breach of the British Government's obligations under Article 45 of the Vienna Convention.

6. Moreover, under the general rules of international law, a State may expropriate property, provided that it is done for a legitimate purpose and upon payment of prompt, adequate and effective compensation. In this instance, if the property is not taken over by the Secretary of State, the squatters will secure title to it, and thus it is in the interests of Cambodia for the Secretary of State to take this action. As regards payment of compensation, section 3(2) provides that, in a case like that of Cambodia, the residue of the sale price of the property after deduction of expenses and other liabilities, is to be paid to the Government of Cambodia (once there is a Government with which we have dealings).

7. Accordingly, it is clear that it is permissible under international law for the Secretary of State to provide for section 2 of the 1987 Act to apply to the Cambodian premises in St. John's Wood.

(Texts provided by the Foreign and Commonwealth Office)

The following Note, dated 21 July 1988, was sent to all Diplomatic Missions in London:

Protocol Department of the Foreign and Commonwealth Office present their compliments to all Foreign and Commonwealth Diplomatic Missions in London and have the honour to draw to their attention the Vice Marshal's Note of 27 March 1985, which expressed the Government's concern at the practice of Missions which employ members of staff who would not otherwise be permitted to work in the UK.

The Department note with regret that cases continue to come to light in which Missions have employed members of staff in this category. This and other matters were considered during a recent Government review of immigration policy. This has resulted in an amendment to Section 8 of the Immigration Act 1971. This was approved by Parliament and comes into force on 1 August 1988.

Section 8(3) of the 1971 Act confers exemption from immigration control on all members of a Mission within the meaning of the Diplomatic Privileges Act 1964, including members of their family forming part of their household. The effect of the recent amendment will be that this exemption will no longer apply to locally-engaged staff in categories C and D (ie members of the administrative and technical staff and the service staff), nor to members of their families forming part of their household.

Missions will continue to be able to employ locally-engaged staff in these categories if the immigration status of such persons enables them to take up that employment. It may also be possible for other persons to be employed in these categories but only if the Mission notifies the Foreign and Commonwealth Office of their appointment in accordance with Article 10 of the Vienna Convention on Diplomatic Relations. The Foreign and Commonwealth Office will of course have to be satisfied that such staff are in bona fide employment.

The Department accordingly request that, with effect from 1 August 1988, all Missions should advise them of all new appointments of locally-engaged staff in

categories C and D whose immigration status would not in normal circumstances enable them to take up that employment.

(Text provided by the Foreign and Commonwealth Office)

The following affidavit was sworn on 10 October 1988 in the *Matter of Lorrain Esme Osman and in the Matter of an Application for a Writ of Habeas Corpus Ad Subjiciendum*, in the Queen's Bench Division of the High Court of Justice:

I, ROGER BLAISE RAMSAY HERVEY, C.M.G., Her Majesty's Vice Marshal of the Diplomatic Corps and Assistant Under Secretary of State in the Foreign and Commonwealth Office, London, MAKE OATH and say as follows:—

1. I am duly authorised to make this affidavit under the authority of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs. I am fully conversant with the procedures governing the notification and recognition of diplomatic agents. Save where otherwise stated I make this affidavit from matters within my own knowledge.

2. I have been shown the purported letters of Full Powers dated 28th October 1985 marked 'WAG 1' which recite the appointment of Lorrain Esme Osman 'to represent in conjunction with respective Liberian Embassies accredited with the European Economic Community, the interest of the Government of Liberia'. I have also been shown the alleged Note from the Liberian Embassy dated 29th October 1985 marked 'WAG 2' which purports to notify the Secretary of State for Foreign and Commonwealth Affairs of the appointment of Lorrain Esme Osman 'as Ambassador-at-Large and Economic Consultant to countries within the European Economic Community based at this Embassy'.

3. The Vienna Convention on Diplomatic Relations 1961 requires under Article 5 that a Head of Mission or diplomatic agent may be assigned to more than one State, unless there is express objection by any of the receiving States. In this case, in view of the terms of the full powers granted to Mr Osman, I would expect notification of his appointment to have been made to all countries within the European Economic Community. As a result of enquiries caused to be made in all other member countries within the European Community, through the British Embassies in those countries, I am informed and verily believe that no notification has been made by the Liberian Government to other member countries within the European Community concerning the appointment of Lorrain Esme Osman. Indeed, I am informed that none of the relevant authorities in any of the Member States of the European Community has heard of Mr Osman; moreover, the Protocol Section of the European Commission in Brussels have no record of Mr Osman and say that in their dealings with the Liberian mission in Brussels there has never been any mention of an 'Ambassador-at-Large'. The position on the notification of Mr Osman's appointment in the United Kingdom is set out below.

4. The nature and status of the appointment purporting to be made by the letters of Full Powers and the alleged notification in the form of a diplomatic Note from the Liberian Embassy to the Foreign and Commonwealth Office dated 29th October 1985 do not constitute a valid notification to the Foreign and Commonwealth Office of the fact of Lorrain Esme Osman's appointment as a member of staff of the Liberian Embassy, since this form of notification is not in accordance

with the normal requirements for such notifications set out by the Foreign and Commonwealth Office and described to foreign diplomatic missions in London in various circular Notes. I exhibit the most recent as RBRH/1. Any notification in the correct form by the Liberian Government to Her Majesty's Government announcing the appointment of Lorrain Esme Osman as 'Ambassador-at-Large' would not have been, and would not now be, accepted by Her Majesty's Government, since it is not and has not been the practice of Her Majesty's Government to accept appointments of this nature. It is also the well-known practice of Her Majesty's Government only to accept the accreditation of one Head of a diplomatic mission in London and not to recognise the title 'Ambassador' granted to other members of the staff of a diplomatic mission by the sending State, although such a title is sometimes accorded by sending States to their senior diplomatic staff as a matter of courtesy. The terms of the Note from the Liberian Embassy about the appointment of Mr Lorrain Esme Osman might perhaps however be taken to imply that he was to be appointed as Head of a Special Mission. Her Majesty's Government has not ratified the New York Convention on Special Missions and does not regard it as being declaratory of international customary law. Nevertheless, the New York Convention on Special Missions by Article 2 requires the consent of the receiving State of the appointment of a Head of a Special Mission. Her Majesty's Government has not consented to the sending of a Special Mission from the Government of the Republic of Liberia with Mr Lorrain Esme Osman as Head of that Mission.

5. In connection with the Note dated 29 October 1985 from the Liberian Embassy to the Foreign and Commonwealth Office which is attached to the affidavit of Mr Willie Alan Givens, I have caused a search to be made of the relevant Foreign and Commonwealth Office files held by Protocol Department, West African Department, Hong Kong Department and the Legal Advisers and can find no trace of any such Note, or of any document or memorandum relating to the Note or arising therefrom.

6. The normal procedure upon notification of the appointment of a member of a mission's diplomatic staff is the following:

- (i) a Protocol Department file would be opened, or the notification papers would be entered on an appropriate existing file;
- (ii) if the notification had been made by Note from the Embassy concerned, the Embassy would be asked to supply a completed notification of appointment form, TX9. I produce such a form as exhibit RBRH/2;
- (iii) any irregularities or lack of clarity in the notification would be subject to further discussion with the Embassy either by telephone or by exchange of Notes; this would include an enquiry as to whether the appointee was replacing an established member of the diplomatic staff and if so, who that member of staff was; if the appointee was not replacing anyone, the Embassy would be asked to explain the functions of the new appointee;
- (iv) if there were doubt as to the nature of the appointment notified, there would also be an exchange of minutes between Protocol Department, the Foreign and Commonwealth Office Legal Advisers and the relevant geographical department as to whether notification should be accepted and there would be an exchange of Notes or other discussion with the relevant Embassy to confirm the status of the appointee;

- (v) once notification had been accepted, a diplomatic identity card would be issued at the request of the Embassy to the new member of the staff, together with related documentation, including authority for the issue of diplomatic number plates;
- (vi) an enquiry would be made of the Embassy to ascertain the address of the member of staff in order that the appropriate rating relief might be applied to his residence.

7. From the search of relevant FCO files, I can find no evidence that any of the action described in paragraph 6 above was taken as a result of any Note dated 29 October 1985 from the Liberian Embassy or any other Note from that Embassy. The first indication of the possible appointment of Lorrain Esme Osman to the Liberian Embassy in London that can be found on these files is the Note dated 4 May 1987 contained in the bundle of correspondence marked WAG 2. The indications are that a Note dated 29 October 1985 was not received in the Foreign and Commonwealth Office.

8. I am informed and verily believe that Lorrain Esme Osman has been resident in the United Kingdom since 1985 and that he owned motor cars and occupied residential property within the jurisdiction. No diplomatic number plates have been issued to him, nor was any application made for his residential property to be granted the usual relief from the payment of rates which is accorded to diplomatic agents in the United Kingdom.

9. Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs respectfully draws the Court's attention to the preamble to the Vienna Convention on Diplomatic Relations which states 'that the purposes of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States', and accordingly places the following matters before the Court concerning the claim of diplomatic immunity made on behalf of Lorrain Esme Osman:

- (i) Lorrain Esme Osman has not been notified in the required format as a member of the staff of the Embassy of the Republic of Liberia.
- (ii) No question was raised by the Embassy of the Republic of Liberia or by Lorrain Esme Osman concerning the absence of Osman's name from the London Diplomatic List or regarding the failure of the Foreign and Commonwealth Office to accord to Osman any of the normal privileges accruing to him by reason of his alleged status as a diplomatic agent (including the relief from taxation and rates, the issuing of a diplomatic identity card or diplomatic number plates).
- (iii) The Embassy of the Republic of Liberia and Lorrain Esme Osman failed to make any claim of diplomatic immunity between December 1985 and 4th May 1987 despite the wide publicity given to the proceedings against Osman and the fact that the Embassy were presumably deprived of Osman's services during that time. Following upon the 4th May 1987 the question of the claim of diplomatic immunity was not thereafter raised at the hearing before the Magistrate at Bow Street or at the first application for habeas corpus made on behalf of Osman before a Divisional Court of the Queen's Bench Division or before the House of Lords.

[*Editorial note*: The most recent circular note referred to in paragraph 4

above, dated 27 March 1985 and issued by the Protocol and Conference Department of the Foreign and Commonwealth Office, reads as follows:

The Vice Marshal of the Diplomatic Corps presents his compliments to all foreign and Commonwealth diplomatic missions in London and has the honour to state that, as a result of the Government's Review of the Vienna Convention, we have made a number of changes to the procedures for the notification of staff changes in diplomatic missions. The revisions involve a closer alignment with the provisions of Article 10 of the Vienna Convention and include two new points: Name of Person being replaced (if any) and Private Servants. A supply of revised TX9 forms is enclosed. It would be appreciated if these could be used henceforth.

The Vice Marshal would like to remind missions that full and accurate information should be provided on the status and classification of staff; and that all staff so notified should have duties fully compatible with the functions of the mission as set out in Articles 3 and 42. The total number of staff should not be in excess of what is necessary for, or consistent with, the role of the mission.

He would also like to draw attention to Article 10.2 which indicates that, where possible, prior notification of arrival and final departure should be given. Notification of change of circumstances should include any changes of private address. It should also include any new information on the arrival or departure, or status, of members of the family forming part of the household. Where appropriate it should include information on members of staff who become UK nationals or permanently resident, for instance following marriage to British citizens.

As regards members of the family forming part of the household, it is normal practice in the UK to accept spouses and minor children under 18, ie sons and daughters. Other relatives may be accepted in some cases but the circumstances must be fully explained to enable a decision to be taken. These include children aged 18 or over if they are clearly resident with the member of the mission concerned and not engaged in paid employment; and in certain cases dependent parents living with the member of the mission.

A serious view will be taken of any misleading or inaccurate notification or of a failure to notify changes of circumstances. Members of staff and dependants who claim diplomatic immunity under false pretences or on the basis of a notification which is no longer accurate will not be immune from prosecution for any offences they may commit. It is for a court to rule on individual status in the light of the evidence placed before it.

In certain cases reclassification or withdrawal of a notification may be sought. When an appointment is terminated, the need for a successor may be questioned. Additions to the overall level of staff are also liable to be queried. If serious doubts exist about a person's designation or functions it may be necessary to declare such a person non grata or unacceptable in accordance with Article 9 of the Vienna Convention.

Finally the Vice Marshal takes this opportunity of expressing concern about the practice of Missions that employ as private servants or as other members of the staff persons who would not otherwise be permitted to work in the UK (eg visitors or students). In accordance with their obligation to respect UK laws and regulations Heads of Mission and members of the diplomatic staff are requested to ensure that they are complying with Home Office rules. In cases of doubt missions should consult Appointments Section of Protocol Department.

(Text provided by the Foreign and Commonwealth Office)]

On 13 October 1988 in the same case, Mr Hervey swore a second affidavit in the case as follows:

I, ROGER BLAISE RAMSAY HERVEY, C.M.G., Her Majesty's Vice Marshal of the Diplomatic Corps and Assistant Under Secretary of State in the Foreign and Commonwealth Office, London, MAKE OATH and say as follows:—

Further to my affidavit dated the 10th day of October 1988 and filed herein, I am informed and verily believe that the Note of the Embassy of the Republic of Liberia dated the 4th day of May 1987 was not received by the Foreign and Commonwealth Office on that day:

The said Note was brought into the Foreign and Commonwealth Office, by the Ambassador of the Republic of Liberia Willie Alan Givens, on 13th July 1987. There is now produced and shown to me marked RBRH/1 the original of the said Note which bears the Foreign Office Registry stamp of the 14th July 1987. The Note was lodged in the Registry one day after it was received.

The Liberian note, dated 4 May 1987, read as follows:

The Ministry of Foreign Affairs of the Republic of Liberia presents its compliments to Her Majesty's Foreign and Commonwealth Office and has the honour to refer to the present detention at the Pentonville prison of Mr Lorrain Osman, Ambassador-At-Large and Economic Consultant to the Government of the Republic of Liberia with full powers and authority as per his Credential attached hereto for easy reference.

In this connection, the Ministry wishes to confirm and re-affirm that Mr Lorrain Esme Osman was duly appointed to said position by the Government of the Republic of Liberia on the 28th day of October 1985, and due to the diplomatic nature of Mr Osman's assignment, the Government of Liberia is requesting the Foreign and Commonwealth Office, to use its good offices in securing the release of Mr Osman in recognition of the Privileges and Immunities that usually appertain to such assignments.

On 14 October 1988 in the same case Mr Hervey swore a third affidavit in the case as follows:

I, ROGER BLAISE RAMSAY HERVEY, C.M.G., Her Majesty's Vice Marshal of the Diplomatic Corps and Assistant Under Secretary of State in the Foreign and Commonwealth Office, London, MAKE OATH and say as follows:—

1. Further to my affidavits dated the 10th October 1988 and 13th October 1988 and filed herein, I am informed and verily believe that on 12th October 1988 Mr Willie Alan Givens telephoned the Foreign and Commonwealth Office and that in my absence Mr D.A. MacLeod Head of the Protocol Department received the telephone call. Mr Givens told Mr MacLeod that, after consultation with the Liberian Foreign Minister, the Government of Liberia would waive the immunity attaching in their view to Lorrain Esme Osman.

2. There is now produced and shown to me marked RBRH/1 a Note delivered to the Foreign and Commonwealth Office by Mr Von Ballmoos, Second Secretary at the Liberian Embassy in London at 4.45 p.m. 12 October 1988.

The Liberian note, dated 12 October 1988, read as follows:

The Embassy of the Republic of Liberia presents its compliments to the Foreign and Commonwealth Office, Protocol Department, and has the honour to refer to its various communications concerning Mr Lorrain E. Osman, Ambassador-at-Large and Economic Consultant to the Government of Liberia.

The Embassy wishes to advise that in view of the cordial and harmonious relations subsisting between Liberia and the United Kingdom and after a thorough and objective consideration of the nature and circumstances surrounding Mr Osman's arrest and detention, the Foreign and Commonwealth Office is hereby notify [sic] of the waving [sic] of his immunity to allow the Law to take its course, thereby enabling us to determine his continuing suitability to serve the Government in the capacities stated above.

Part Five: V. *Organs of the State—consular agents and consulates*

The following Note, dated 6 May 1988, was sent to Diplomatic Missions and Consulates in London by the Protocol Department of the Foreign and Commonwealth Office:

Protocol Department present their compliments to Diplomatic Missions and Consulates and have the honour to inform them that the Department have decided that henceforth, in accordance with Article 4 of the Vienna Convention on Consular Relations, they will decline to approve the appointment of any Honorary Consul-General except where under an obligation to do so by virtue of a bilateral Consular Convention. Honorary Consuls-General who have already been appointed will not be affected, but they may not be replaced in their present rank. (Text provided by the Foreign and Commonwealth Office)

Part Five: VII. *Organs of the State—armed forces*

In reply to a question, the Minister of State for Defence Procurement wrote:

The stationing of US forces in the United Kingdom is governed by a number of agreements between the British and US Governments. The agreements, most of which are classified, have all come into force since 1950. The operational use in an emergency of bases made available to US forces in the UK is covered by the Churchill-Truman understanding of 1952.

(HL Debs., vol. 499, col. 241: 5 July 1988)

Part Five: VIII. A. *Organs of the State—immunity of organs of the State—diplomatic and consular immunity*

(See also Part Four: VI. (item of 12 April 1988) and Part Five: IV. (*Osman* case), above)

In the course of proceedings in a House of Commons Standing Committee on the subject of the Arms Control and Disarmament Bill, the Minister of State, Foreign and Commonwealth Office, Mr David Mellor, stated:

The Bill is a narrow technical measure which provides for observers coming to this country pursuant to the Stockholm arrangement—to be granted the privileges and immunities accorded to diplomats by the 1964 Act. It makes further provision that if any future arms control agreement require verification and inspection on our territory, observers accredited under those measures may also be granted temporary immunity in accordance with the 1964 Act, if that is the will of both Houses of Parliament, as expressed in an affirmative resolution that can be debated on the Floor of the House. That will give ample scope for hon. Members to raise points on any future provision. There is precedence for this in the procedure for conferring privileges and immunities upon international organisations in the International Organisations Act 1968, and for conferring additional privileges and immunities upon consular officials for certain countries under the Consular Relations Act 1968—both passed by a Labour Government. Looking ahead to some Opposition amendments, it would be futile if we insisted that there should be primary legislation each time an arms control agreement was concluded.

(HC Standing Committee D, Arms Control and Disarmament Bill, col. 17: 3 November 1987)

Later in the proceedings, the Minister remarked:

Let us now turn to privileges and immunities, which is the magic phrase that will bring everyone back into order in this discussion. The first thing we must be clear about . . . is that no changes are made to privileges and immunities by the Bill. The Bill merely extends the category of people who are entitled to them. However, the position on privileges and immunities remains precisely as set out in the Diplomatic Privileges Act 1964 . . .

In practice, many of these privileges will have little effect for persons on short visits. Those people will be in the country for a few days at most and only a matter of hours in some cases. Inspectors and observers will enjoy, amongst other things, inviolability of the person, immunity from criminal jurisdiction and, with minor exceptions, immunity from civil and administrative jurisdiction, exactly as long-term diplomats do. Indeed, many of these people will be long-term diplomats anyway because someone who is an accredited diplomat in London will be given the role of observer only for the particular purpose of the inspection that is proposed, but he will need back-up staff.

When we as a British team went to inspect, under the Stockholm arrangements, a set of manoeuvres in East Germany in September we had a back-up team of 10, including the pilot who flew the aircraft.

Auxiliary personnel of that sort are equated with administrative technical staff and similar people. They likewise enjoy inviolability of the person and immunity from criminal jurisdiction, but their immunity from civil and administrative jurisdiction will not extend to acts performed outside the course of their duties. Those are the arrangements governing the lower levels of support staff in long-term missions. A lower category of auxiliary personnel who are equated with service staff will enjoy immunity from both criminal and civil jurisdiction only in respect of acts performed in the course of their duties. Whether someone is pinched for parking on a double yellow line, which was one of the examples given, depends into which category he falls.

(Ibid., cols. 43–44; 5 November 1987)

In moving the second reading in the House of Lords of the Arms Control and Disarmament (Privileges and Immunities) Bill, the Government spokesman, Lord Glenarthur, stated:

The main objective of the Bill is to give effect to the outcome of the Stockholm conference on confidence and security building measures and disarmament in Europe. This concluded on 22nd September 1986 with agreement on a substantial package of measures relating to the notification, observation and inspection of military activities in Europe. In addition to the military provisions of the document the Stockholm accord also calls on participating states to confer privileges and immunities, as laid down by the Vienna convention on diplomatic relations, both to inspectors carrying out on-site verification and to observers invited to military activities notified under the terms of the accord.

This Bill is therefore designed to confer upon both observers and inspectors, as well as on their auxiliary staff, those privileges and immunities which are set out in detail in the Diplomatic Privileges Act 1964. This means that both inspectors and observers will be equated with diplomatic agents while in the United Kingdom. As a result, they will enjoy inviolability of the person as well as immunity from criminal jurisdiction and, with some exceptions, from civil and administrative jurisdiction as well.

Auxiliary personnel will be equated with administrative and technical staff assigned to embassies in the United Kingdom. They will enjoy the same privileges, except that their immunity from civil and administrative jurisdiction will be confined to acts performed during the course of their duties.

The Bill also provides for privileges and immunities to be conferred by Order in Council, subject to the affirmative resolution procedure, to give effect to any international agreement or arrangement superseding the Stockholm document, or making provision for furthering arms control or disarmament. The purpose of extending the Bill in this manner is to avoid as far as possible the need for primary legislation each time there is a new arms agreement involving the granting of privileges and immunities, for example, to those involved in its verification.

The INF Treaty is an example of this. It is the Government's intention, once this Bill becomes law, to introduce an Order in Council to cover the INF inspection arrangements in the UK. But such extensions will be done under the affirmative resolution procedure, which will give your Lordships the opportunity to debate the order when the time comes. The only privileges and immunities which the Bill confers directly are those stemming from the Stockholm document.

I should like to make clear that no changes are made in this Bill to the privileges and immunities set out in the Diplomatic Privileges Act 1964. The present Bill merely extends the category of people who are entitled to them. Nor in practice will the proposed extension to Stockholm observers and inspectors greatly increase the number of people entitled to full diplomatic privileges and immunities in the United Kingdom. Many such observers and inspectors are likely to be diplomats or military attachés already accredited here.

Those coming from abroad will only be granted privileges and immunities for the duration of their stay in the United Kingdom. In practice, this is likely to be about two or three days in each case. Nor will such observations or inspections be particularly frequent. The maximum number of inspections any country must accept under the Stockholm accord is three per year; and we are unlikely to invite

observers to military exercises in the UK more than once every two or three years. Moreover, while we are obliged under the terms of the accord to invite representatives of all 35 signatory states, in practice many of the smaller states do not send observers.

(HL Debs., vol. 491, cols. 1398–1400: 14 January 1988)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We seek continually to reduce the number of unpaid parking fines by diplomats in London through the firm application of the policy described in the White Paper on diplomatic immunities and privileges (Cmnd 9497).

(HC Debs., vol. 126, Written Answers, cols. 639–40: 3 February 1988)

The Foreign and Commonwealth Office provided the following explanatory note, dated March 1988, for the Parliamentary Joint Committee on Statutory Instruments which was considering the draft Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles (Inspections) (Privileges and Immunities) Order 1988:

Explanatory Note for the Joint Committee on Statutory Instruments

It is proposed that this Order should be made under section 1(2) of the Arms Control and Disarmament (Privileges and Immunities) Act 1988. That section provides that no such Order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

The structure of the arrangements for the elimination of United States (or *vice versa* Soviet) intermediate-range and shorter-range missiles is somewhat unusual. The obligation to eliminate the missiles and the procedures to be followed, including the inspection arrangements, are laid down in a series of essentially bilateral treaty instruments between the United States and the Soviet Union. The application of these inspection arrangements in the United Kingdom (and the other European 'Basing Countries') is then provided for in detail in the Agreement signed on 11 December 1987 among the United States of America and the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Italy, the Kingdom of the Netherlands and the United Kingdom of Great Britain regarding Inspections relating to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter-Range Missiles ('the Basing Country Agreement'). Finally, in an Exchange of Notes dated 21 December 1987 (Cm. 311) formal provision is made for the granting of the necessary inspection rights by Her Majesty's Government to the Soviet Union on certain conditions. The entry into force provisions are linked so that both of the above international agreements to which the United Kingdom is a Party will enter into force simultaneously with one another, and with the entry into force of the main Treaty on its ratification by the United States of America and the Soviet Union.

The Order is based upon the Basing Country Agreement inasmuch as it is that Agreement which relates in detail the provisions for inspection in the United Kingdom, and in particular the privileges and immunities of inspection teams and associated persons and property (the Exchange of Notes merely grants inspection

rights in general terms). The Annex to the Basing Country Agreement provides for certain privileges and immunities to be accorded to inspectors and air crew members carrying out inspections in the United Kingdom to verify the implementation of the Treaty between the United States and the Soviet Union, as well as to their equipment and aircraft. The present Order will confer these privileges and immunities, and will enable Her Majesty's Government to notify their approval of the Basing Country Agreement, and thus allow for the simultaneous entry into force of all the treaties and agreements as aforesaid.

Section 1(2) of the 1988 Act provides that the privileges and immunities to be conferred by an Order in Council may not exceed those conferred by the Diplomatic Privileges Act 1964, which implements the Vienna Convention on Diplomatic Relations.

The table attached to this Note shows the Articles of the draft Order, the corresponding provision in the Vienna Convention on Diplomatic Relations, and the relevant provision in the Basing Country Agreement.

The privileges and immunities to be conferred by the Order are no greater in extent than those required by the Basing Country Agreement or those authorised by the 1988 Act.

<i>Draft Order</i>	<i>Vienna Convention on Diplomatic Relations</i>	<i>Basing Country Agreement</i>
Article 1(2)	—	Article III, para 2; and Article IV, para 4.
Article 2	Article 36(1)	Article IV, para 5.
Article 3	Article 22(3)	Annex, para 2, second sentence.
Article 4, chapeau	Article 39(2)	Annex, preamble.
Article 4(1)(a)	Article 29	Annex, para 1.
Article 4(1)(b)	Article 30(2)	Annex, para 2, first sentence.
Article 4(1)(c)	Article 31(1), (2) and (3)	Annex, para 3, first sentence.
Article 4(1)(d)	Article 36	Article V, para 2; and Annex, para 4.
Article 4(2)	Article 32	Annex, para 3, second sentence.

(Text provided by the Foreign and Commonwealth Office; see also *Parliamentary Papers*, 1987–88, HC, Paper 67, p. 6)

The Foreign and Commonwealth Office provided the following explanatory note, dated 11 April 1988, for the Parliamentary Joint Committee on Statutory Instruments which was considering the draft European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Immunities and Privileges) Order 1988:

Explanatory Note for the Joint Committee on Statutory Instruments

1. It is proposed that this Order should be made under Section 5 of the International Organisations Act 1968. Section 10(1) of the 1968 Act provides that no recommendation should be made to Her Majesty in Council to make an Order

under Section 5 unless a draft of the Order has been laid before Parliament and approved by a resolution of each House.

2. Under section 5(1), an Order in Council may 'confer on any class of persons to whom [the] section applies such privileges, immunities and facilities as in the opinion of Her Majesty in Council are . . . required for giving effect . . . to any agreement to which . . . Her Majesty's Government in the United Kingdom is . . . a party'.

3. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Cm. 339) requires privileges and immunities to be conferred upon the members of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('the Committee') and the experts by which the members of the Committee are assisted in accordance with Article 7, paragraph 2, of the Convention. The present Order will confer these privileges and immunities and will enable HMG to ratify the Convention.

4. The Committee is a 'body which . . . performs . . . functions . . . by way of . . . conciliation or inquiry', and is thus an 'international tribunal' within the meaning of section 5(5) of the 1968 Act. Accordingly, the members of the Committee are 'members of any international tribunal', and the experts by which they are assisted are 'other officers of any international tribunal'; thus, in both cases they are persons to whom section 5 applies (by virtue of subsection (2)(a) and (b), respectively).

5. The privileges and immunities conferred by the Convention are closely modelled upon those conferred upon the European Court of Human Rights by the Fourth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Paris, 16 December 1961 (Cmnd. 4739), which was implemented in the law of the United Kingdom by the European Commission and Court of Human Rights (Immunities and Privileges) Order 1970 (S.I. 1970 No. 1941). The drafting of the present Order accordingly follows that used in S.I. 1970 No. 1941.

6. The table attached to this Note shows the Articles of the draft Order and the corresponding paragraphs of the Annex to the Convention.

7. The privileges and immunities to be conferred by the Order are those 'required for giving effect' to the Convention, for the purposes of section 5(1) of the 1968 Act.

8. The persons upon whom immunities are conferred by the Order will also be exempt from immigration control, by virtue of Article 4(g) of the Immigration (Exemption from Control) Order 1972 (S.I. 1972 No. 1613); this is required for giving effect to paragraph 2(b) of the Annex to the Convention.

<i>Draft Order</i>	<i>Corresponding Provision of Annex to the Convention</i>
Article 3	Paragraph 4
Article 4, chapeau	Paragraph 6
Article 4(a)	Paragraphs 2(a) and 5
Article 4(b)	Paragraph 2(a)
Article 4(c)	Paragraph 2(a)

(Text provided by the Foreign and Commonwealth Office)

In moving the approval in the House of Lord of the draft Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles (Inspections) (Privileges and Immunities) Order 1988, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated.

. . . this order is made under Section 1(2) of the Arms Control and Disarmament (Privileges and Immunities) Act 1988, which received its Royal Assent on 9th February. The Joint Committee on Statutory Instruments has considered the order and has made no comment, other than to draw the attention of Parliament to the Explanatory Note prepared for the committee by my department.

As your Lordships will recall, the Arms Control and Disarmament (Privileges and Immunities) Act is principally concerned with the granting of diplomatic privileges and immunities to observers and inspectors carrying out functions in the United Kingdom under the terms of the Stockholm Agreement. But it also provides for the extension, by means of an Order in Council, of such privileges and immunities to inspection personnel involved in other future arms control agreements. The Government made clear at the time that the INF treaty was one such agreement for which recourse to this provision of the Act was envisaged.

The aim of the order is to enable the British Government to fulfil the particular obligations which we have undertaken in respect of the verification of the INF treaty. The nature of these obligations, and the reason why they take the form they do, has been the subject of previous debates in your Lordships' House, and I shall not rehearse the background again this evening.

Needless to say the privileges and immunities to be conferred on Soviet inspectors and aircrew for the protection of their official functions when conducting INF inspections will cover only activities carried out in the United Kingdom. This is for the period from their arrival at the point of entry until their departure from the UK. The Order in Council also confers certain privileges and immunities on the equipment and aircraft used by the INF inspectors and aircrew. Naturally these privileges and immunities are no more extensive than those required under the Basing Country Agreement. They correspond directly to the privileges and immunities annex to the Basing Country Agreement, which in turn reproduces verbatim the relevant parts of the protocol between the USA and the Soviet Union. Nor do the privileges and immunities exceed those conferred by the Vienna Convention on Diplomatic Relations.

The United States Senate will vote on the ratification of the INF treaty within the next few weeks. It seems likely that the vote will be overwhelmingly in favour. We expect the United States and Soviet instruments of ratification to be exchanged during President Reagan's visit to Moscow from 29th May to 2nd June. The treaty will enter into force immediately thereafter. It is essential that the United Kingdom is able to fulfil its obligations in respect of the treaty as soon as it enters into force. This draft Order in Council will enable us to do so. I commend it to your Lordships, and beg to move.

(HL Debs., vol. 495, cols. 1198-9: 14 April 1988; see also HC Debs., vol. 132, cols. 303-4: 26 April 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Forty-three alleged serious offences by persons entitled to immunity were drawn to the attention of the Foreign and Commonwealth Office in 1987. 'Serious

offences' are defined in accordance with the report of the Foreign Affairs Committee *The Abuse of Diplomatic Immunities and Privileges* (1985) as offences falling into a category which could in certain circumstances attract a penalty of six months or more; we are advised that very few of the alleged offences would have been likely to attract a custodial sentence. The majority involve drinking and driving and shoplifting.

Eighteen diplomats were withdrawn from their posts in Britain in 1987 following alleged offences.

(HL Debs., vol. 496, col. 670: 4 May 1988)

In the course of moving an amendment to the Immigration Bill, the Minister of State, Home Office, Mr Timothy Renton, stated:

Finally, there are those who clearly have no basis under the rules for remaining in the United Kingdom. They include illegal entrants, those on temporary admission or overstayers themselves.

The numbers are not at all large. In 1986, 119 overstayers or illegal entrants took up employment that entitled them to exemption from immigration control, and a further 286 people, whose conditions of stay prohibited employment, had these conditions removed on the grounds of their exempt employment. The great majority of them were employed as members of missions. While the scale of the abuse is not great, so long as this method of evading removal remains, it is sadly inevitable that it will be exploited from time to time.

We are not concerned with those who are appointed as full diplomatic agents. We do not wish to intervene in that area, and that is not where the problems arise. The evidence of abuse is restricted to those in what are known as categories C and D employment with a mission—administrative and technical staff and those employed in the domestic service of the mission, such as drivers and caretakers.

The effect of the new clause will be that locally engaged staff in non-diplomatic posts and their families will no longer be exempt from immigration control. Missions will be able to continue to employ locally engaged staff in those categories if their immigration status enables them to take that employment. It may also be possible for others to be employed in those categories, but only if the mission notifies the Foreign and Commonwealth Office of their appointment in accordance with the Vienna convention on diplomatic relations.

The Foreign and Commonwealth Office needs to be satisfied that the individual is in bona fide employment and thus entitled to immunities and privileges. Where those requirements are met, the mission may be allowed to take on locally engaged staff in those categories. However, if it does, those members of the mission will be subject to immigration control.

Furthermore, in accordance with the Vienna convention, the mission will be required to notify the appointment of the individual and the termination of his appointment. Those changes will improve the effectiveness of our control procedures.

Nothing in the proposed amendment resiles from the United Kingdom's commitment as a signatory to the Vienna convention. Our approach is not inconsistent with that adopted by other countries to the employment of locally engaged staff in our missions abroad. On the contrary, the proposed amendment simply puts into practice the advice already given to missions by the Vice Marshal of the

Diplomatic Corps that they should not employ persons who would not otherwise be permitted to work in the United Kingdom. Equally, the proposed amendment will not apply retrospectively. Those already employed by a mission will retain their exemption from immigration control while they remain in that capacity.

The new arrangements will be fully explained to missions before the amendments come into effect. The proposed consequential amendment to clause 11 would simply provide the amendment to section 8(3) to be brought into effect by means of a commencement order.

I commend the amendments to the House.

(HC Debs., vol 132, cols. 975-6: 4 May 1988)

Later in the debate, the Minister observed:

As it stands, section 8(3) of the Immigration Act 1971 provides for all members of a mission to be exempt from immigration control in a way that is not demanded by the terms of the Vienna convention on diplomatic relations.

(Ibid., col. 980)

In moving the approval of the draft European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Immunities and Privileges) Order 1988, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, stated in part:

The order provides that the members of the European committee, to be established in accordance with article 1 of the convention for the prevention of torture and inhuman or degrading treatment or punishment, shall enjoy the appropriate privileges and immunities to enable them to exercise their functions under the convention.

(HC Debs., vol. 133, col. 565: 12 May 1988)

In moving the approval in the House of Lords of the same draft Order, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated in part:

The order provides that the members of the European Committee to be established in accordance with Article 1 of the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment shall enjoy the appropriate privileges and immunities to enable them to exercise their functions under the convention.

The task of the committee will be to arrange visits to places of detention in order, in the terms of Article 1 of the convention: 'to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment'.

Parties to the convention are required to offer the members of the committee every facility in the performance of their tasks, in particular by giving them access at any time to any place where persons may be held (for instance, police stations, prisons and hospitals) and the opportunity to interview detainees in private and likewise their families, legal representatives and doctors.

Apart from periodic or routine visits in the territory of each contracting party,

the committee may organise any *ad hoc* visits warranted. After each visit the committee will communicate its findings and recommendations to the party concerned. This procedure is confidential.

This non-judicial and confidential procedure is designed to assist governments in treating detainees properly. It aims at co-operation between the committee and the state concerned, not the latter's conviction by a judicial authority.

If this committee is to be able to carry out its task fearlessly and impartially, it is vital that its members be accorded certain privileges and immunities, not for their personal benefit, but in order to safeguard the independent exercise of their functions and free them from any constraints in carrying out their duties.

This order accordingly provides for the members, whilst performing their official duties, to have some of the privileges and immunities accorded to a head of a diplomatic mission, such as immunity from legal action, immunity from personal arrest or detention, inviolability of documents and papers and inviolability of personal baggage.

(HL Debs., vol. 497, cols. 257–8: 17 May 1988)

In the course of replying to a question about Iran/UK relations, the Minister of State, Foreign and Commonwealth Office, wrote:

We remain critical of the Iranian Government's record on human rights and respect for other international conventions. For example, two British citizens, Roger Cooper and Nicholas Nicola, have been detained in Tehran, without trial and without consular access, in breach of the Vienna convention on consular relations. In addition, Iran continues to make unlawful attacks on unarmed merchant vessels, including British ships in the Gulf.

Furthermore, violations of diplomatic immunity such as the detention of a British diplomat, Mr Chaplin, in May 1987 represent deliberate flouting of the Vienna convention on diplomatic relations.

(HC Debs., vol. 136, Written Answers, cols. 189–90: 28 June 1988)

In reply to the question what guidance is issued to members of the diplomatic corps with regard to the precise point at which their diplomatic immunity takes effect in respect of a particular posting, the Minister of State, Foreign and Commonwealth Office, wrote:

None. The point at which immunity takes effect is covered by the provisions of Article 39 of the Vienna Convention on Diplomatic Relations, which will be known to the sending State.

(HC Debs., vol. 138, Written Answers, col. 303: 27 July 1988; see also *ibid.*, col. 303)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, stated:

When it is alleged that a member of the staff of a diplomatic mission has committed a criminal offence, we follow the policy laid down in paragraphs 57–73 of the White Paper 'Diplomatic Immunities and Privileges' (April 1985; Cmnd. 9497).

(HC Debs., vol. 138, Written Answers, col. 302: 27 July 1988)

Following an incident in which a Vietnamese diplomat was alleged to

have brandished a pistol in the face of a demonstration outside the Vietnamese Embassy in London, the following statement was issued by the Foreign and Commonwealth Office at a press conference held on 7 September 1988:

Spokesman explained that British Government policy was clear, and was laid out in the 1985 White Paper. Firearm offences normally led to a request for withdrawal in the absence of a waiver of immunity. Firearm certificates were not issued for weapons for use by the security staff of Missions or the personal protection of individuals. The British Government had repeatedly made clear that the abuse of diplomatic immunity would not be tolerated.

(Text provided by the Foreign and Commonwealth Office)

Part Five: VIII. B. *Organs of the State—immunity of organs of the State—immunity other than diplomatic and consular*

(See also part Five: IV. (Cambodian Mission premises), above)

In a speech in the Sixth Committee of the UN General Assembly on 11 November 1988, the UK representative, Mr A.D. Watts, examined the International Law Commission's draft articles on the subject of the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier. He remarked in part:

In relation to draft *Article 2, paragraph 1*, the Special Rapporteur discusses the important question of the extent to which the political subdivisions, agencies and instrumentalities of a State enjoy immunity; in paragraph 508 of the Report he refers to this as a matter of 'interpretation'. My delegation, however, would respectfully suggest that this is a question of substance—and indeed an important one. The firm view of my delegation is that political subdivisions, and so on, should only enjoy immunity where they are acting in the exercise of sovereign authority.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/43SR.39, p. 21)

Part Six: I. A. *Treaties—conclusion and entry into force—conclusion, signature, ratification and accession*

(See also Part One: II. D. 1. (*passim*), above)

In reply to the question why agreement to European Community signature of the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer was given before Parliamentary scrutiny procedures were complete, the Minister of State, Department of the Environment, wrote:

When international negotiations were approaching their conclusion, the Commission sought the Council's agreement to Community signature of the Protocol to the Vienna Convention by means of Document 8335/87 dated 11th September 1987. The Council's authorisation was given by means of urgent written procedure in time for a Conference of Plenipotentiaries in Montreal at which the Protocol on Substances that Deplete the Ozone Layer was adopted on 16th September. The Community (and the United Kingdom) signed the protocol on the same day.

The House was in recess at the time and it was not possible for the normal scrutiny procedures to be carried out. The Government did, however, keep the House informed of developments (*Hansard*, col. 319 of 27th November 1986; col. 134 of 24th March 1987; col. 379 of 23rd July 1987) and have since reported on the outcome of the diplomatic conference (*Hansard*, col. 277 of 28th October 1987).

The text of the protocol will be published as a Command Paper and laid before the House before ratification in accordance with the usual practice.

(HL Debs., vol. 491, col. 1340: 13 January 1988; see also HC Debs., vol. 125, Written Answers, cols. 282-3: 13 January 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have signed and ratified 73 conventions and protocols of the Council of Europe. Nine conventions and protocols have been signed but not yet ratified. These are:

1. Protocol 4 to the Convention of Human Rights securing certain other Rights and Freedoms.
2. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
3. European Convention on the Recognition of the Legal Personality of Non-Governmental Organisations.
4. European Convention on the Control of the Acquisition and Possession of Firearms by Individuals.
5. European Convention on the Compensation of Victims of Violent Crimes.
6. Convention Relating to Stops on Bearer Securities in International Circulation.
7. Convention on the Establishment of a Scheme of Registration of Wills.
8. European Convention for the Protection of Animals for Slaughter.
9. European Convention for the Protection of Vertebrate Animals used for Experimental Purposes.

(HC Debs., vol. 130, Written Answers, col. 629: 31 March 1988)

The following instrument of ratification is set out as an example of UK practice:

WHEREAS a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was opened for signature by all States at the United Nations Headquarters, New York, on the Fourth day of February, One thousand Nine hundred and Eighty-five;

AND WHEREAS the said Convention was signed on behalf of the United Kingdom of Great Britain and Northern Ireland, on the Fifteenth day of March, One thousand Nine hundred and Eighty-five;

NOW THEREFORE the Government of the United Kingdom of Great Britain and Northern Ireland, having considered the Convention aforesaid, hereby confirm and ratify the same on behalf of:

The United Kingdom of Great Britain and Northern Ireland
 Anguilla
 British Virgin Islands
 Cayman Islands

Falkland Islands
 Gibraltar
 Montserrat
 Pitcairn, Henderson, Ducie and Oeno Islands
 Saint Helena
 Saint Helena Dependencies
 Turks and Caicos Islands

and undertake faithfully to perform and carry out all the stipulations therein contained.

In witness whereof this Instrument of Ratification is signed and sealed by Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs.

Done at London the Second day of December One thousand Nine hundred and Eighty-eight.

[Signature of Sir Geoffrey Howe]

(Text provided by the Foreign and Commonwealth Office)

Part Six: I. B. *Treaties—conclusion and entry into force—reservations and declarations to multilateral treaties*

Under Article 17 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, which was adopted by the UN General Assembly on 10 December 1984, a Commission against Torture was established. In depositing its instrument of ratification with the Secretary-General of the UN on 9 September 1987, the German Democratic Republic made the following declaration:

The German Democratic Republic declares that it will bear its share only of those expenses in accordance with Article 17, Paragraph 7, and Article 18, Paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic.

(C.N. 232.1987. TREATIES-3)

In response, the UK Permanent Representative to the UN, Sir Crispin Tickell, wrote to the Secretary-General on 8 December 1988 as follows;

The Government of the United Kingdom of Great Britain and Northern Ireland do not regard the said declaration as affecting in any way the obligations of the German Democratic Republic as a State Party to the Convention (including the obligation to meet its share of the expenses of the Committee Against Torture as apportioned by the first meeting of the States Parties held on 26 November 1987 or any subsequent such meetings) and do not accordingly raise objection to it. They reserve however the rights of the United Kingdom in their entirety in the event that the said declaration should at any future time be claimed to affect the obligations of the German Democratic Republic as aforesaid.

(Text provided by the Foreign and Commonwealth Office)

In the same letter, the UK Permanent Representative also wrote:

The Government of the United Kingdom declare under Article 21 of the said

Convention that they recognise the competence of the Committee Against Torture to receive and consider communications submitted by another State Party, provided that such other State Party has, not less than twelve months prior to the submission by it of a communication in regard to the United Kingdom, made a declaration under Article 21 recognising the competence of the Committee to receive and consider communications in regard to itself.

(Ibid.)

Part Six: I. D. *Treaties—conclusion and entry into force—‘without prejudice’ provisions*

(See Part Six: II. D. (UK Note of 14 August 1987), below)

Part Six: II. A. *Treaties—observance, application and interpretation—observance*

(See also Part Six: II. C., Part Eleven: II. A. 6. (material on the subject of the Treaty of Peace with Japan) and Part Fourteen: I. B.7., below)

In the course of a reply to a question about the verification of nuclear disarmament treaties, the Minister of State, Foreign and Commonwealth Office, wrote:

In our view, treaty verification is a matter for the parties to each treaty. (HC Debs., vol. 125, Written Answers, col. 721: 20 January 1988)

In the course of a debate on 17 February 1988 in the UN Security Council on the subject of the destruction of a Korean airliner in flight on 29 November 1987, the UK representative, Mr J. Birch, stated:

It is vitally important that the international community should co-operate closely to combat terrorism. Both Security Council resolution 579 (1985) and General Assembly resolution 40/61 emphasized the importance of States becoming party to the existing international Conventions relating to various aspects of international terrorism, including those relating to the safety of civil aviation. I should like to underline this again today. It is vital, of course, that States parties to the various Conventions comply with their obligations under them in good faith.

(S/PV. 2792, pp. 13–16)

Part Six: II. C. *Treaties—observance, application and interpretation—interpretation*

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We place importance on the strict observation by all states of their treaty obligations: but as a non-party to the anti-ballistic missile treaty we have no locus to interpret it.

(HL Debs., vol. 495, col. 857: 30 March 1988)

The Second Report from the House of Commons Defence Committee

considered, *inter alia*, the Government's *locus standi* to interpret the Anti-Ballistic Missiles Treaty. In a response, which was published in June 1988, the Government observed:

Having considered the matter in the light of the Committee's comments, the Government remains convinced that its policy towards the interpretation of the ABM Treaty is the right one. It does not, therefore, intend to depart from its policy of restraint over the interpretation of the Treaty which is a matter for the Parties. The legal reasons behind this policy are set out in the Annex to this Memorandum. The Government nevertheless remains keenly interested in the views of both Parties on the interpretation of the ABM Treaty, because of its political and strategic importance, and will continue to encourage them to reach agreement among themselves on disputed or uncertain points. The Treaty itself establishes a particular mechanism for this in the Standing Consultative Commission.

(*Parliamentary Papers*, 1987-88, HC, Paper 495, pp. 95-6)

The Annex mentioned above read as follows:

ANNEX

The interpretation of any treaty, whether bilateral or multilateral is a matter for the Parties to it: there is no authority in a non-Party State to determine the rights and obligations of other States towards one another under a treaty between them. This would not preclude a non-Party State from forming a view as to the meaning of the treaty or as to the extent of the rights and obligations of the Parties toward one another under it, eg where the meaning or extent of the treaty has significance for its own policies or actions, or where its own rights or national interests may be affected. But non-Party States should observe a degree of restraint over interpreting the treaty rights and obligations of other States, particularly where the point at issue is a matter of controversy between the Parties themselves. There are also practical limits on attempted interpretation by a non-Party. Many of the elements which, under the commonly accepted rules of international law, may be significant or even decisive for interpretation in a particular case, are by their nature unlikely to be available to a non-Party. This applies especially to the preparatory work of the treaty and to subsequent agreements or practice of the Parties in the application of the treaty.

(*Ibid.*, p. 98)

Part Six: II. D. *Treaties—observance, application and interpretation—treaties and third States*

(See also Part Six: II. B., above)

On 14 August 1987 an Exchange of Notes was concluded between the UK Government and the Government of the USSR. The text of the UK Note read as follows:

Note No. 145

Her Britannic Majesty's Embassy of the United Kingdom of Great Britain and Northern Ireland present their compliments to the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics and have the honour to refer to the under-

standing reached among representatives of the United Kingdom of Great Britain and Northern Ireland, the Federal Republic of Germany, the USSR and the United States of America in New York on 3 September 1986.

In this connection the Embassy have the honour to state, on behalf of the Government of the United Kingdom, that, on the understanding that the Soviet side shall be bound by the provisions of the Agreement on the Resolution of Practical Problems with Respect to Deep Seabed Mining Areas signed at New York on 14 August 1987 by representatives of Belgium, Canada, Italy, the Netherlands and the Union of Soviet Socialist Republics, the United Kingdom side also shall be bound by the provisions of that Agreement in the same manner as other parties to that Agreement are bound by its provisions to the Soviet party.

Nothing in the above referenced Agreement, this Note, or in the Note of the Ministry in reply, nor acts or activities taking place pursuant thereto, shall prejudice the position of either side with respect to the United Nations Convention on the Law of the Sea of 1982.

If it is acceptable to the Soviet side, this Note and the Note in reply from the Ministry shall constitute an agreement between the two Governments which shall enter into force upon the date of the Note in reply from the Ministry, and which shall remain in force for the duration of the Agreement on the Resolution of Practical Problems with Respect to Deep Seabed Mining Areas or until otherwise agreed by the two sides, whichever is the later.

(UKTS No. 34 (1988), p. 4; Cm. 383)

Part Six: II. E. *Treaties—observance, application and interpretation—treaty succession*

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Joint Declaration on the question of Hong Kong provides that 'The provisions of the international covenant on civil and political rights and the international covenant on economic social and cultural rights as applied to Hong Kong shall remain in force'.

It is our understanding that the Chinese Government will make provision in the Basic Law for the future Hong Kong special administrative region, which they are currently drafting, to give effect to this undertaking in the joint declaration.

Should further relevant conventions be extended to Hong Kong before 1997, we, together with the Chinese Government, would need to consider their continued application to Hong Kong after 30 June 1997.

(HC Debs., vol. 126, Written Answers, col. 468: 1 February 1988)

In reply to a further question, the same Minister wrote:

It has been agreed in the Sino-British joint liaison group that relevant international labour conventions which currently apply to Hong Kong shall continue to apply to the Hong Kong SAR. Should further international labour conventions need to be applied to Hong Kong before then, we, together with the Chinese Government, would need to discuss the matter.

(Ibid.)

Part Six: IV. C. *Treaties—invalidity, termination and suspension of operation—termination, suspension of operation, denunciation*

On 9 February 1987 there was signed by the Governments of the UK, Australia and New Zealand an Agreement to Terminate the Nauru Island Agreement 1919. Article 5, paragraph 2 of the Agreement reads as follows:

Insofar as it is still in force, the Nauru Island Agreement shall be terminated on the date upon which the presentation to each Partner Government of final accounts provided for in Article 1 has been completed as recorded in an exchange of notes through the diplomatic channel at Canberra between the Partner Governments.

(UKTS No. 4 (1988); Cm. 285)

On 14 August 1987 an Exchange of Notes was concluded between the UK Government and the Government of Italy. Similar Notes were exchanged on the same day between the UK Government and the Governments of Canada, Belgium and the Netherlands respectively. The text of the UK Note to the Italian Government read:

NOTE VERBALE NO. 232

Her Britannic Majesty's Embassy present their compliments to the Ministry of Foreign Affairs of the Republic of Italy and have the honour to refer to the Agreement of the Resolution of Practical Problems with Respect to Deep Seabed Mining Areas concluded at New York on 14 August, 1987, between the Governments of the Kingdom of Belgium, Canada, the Republic of Italy, the Kingdom of the Netherlands and the Union of Soviet Socialist Republics and the Exchange of Notes relating to that Agreement dated 14 August, 1987, between the United Kingdom and the Union of Soviet Socialist Republics. In this connection the Embassy have the honour to propose that the Government of the Republic of Italy shall not take steps to terminate that Agreement and the Government of the United Kingdom shall not take steps to terminate the agreement concluded by that Exchange of Notes, except by common accord of the Government of the United Kingdom and the Government of the Republic of Italy.

If it is acceptable to the Government of the Republic of Italy this Note and the Note in reply shall constitute an agreement between the two Governments which shall enter into force on the date of the Note in reply from the Ministry of Foreign Affairs.

(UKTS No. 34 (1988), p. 17; Cm. 383)

Part Seven: I. *Personal jurisdiction—general concept*

(See Part Eight: II. D. (item of 8 February 1988), below)

Part Eight: I. A. *State territory and territorial jurisdiction—parts of territory, delimitation—frontiers, boundaries*

(See also Part Three: I. E. (item of 30 March 1988), above, Part Eight: II. A. (items of 8 March and 27 June 1988), and Part Nine: I. A. (items of 26 October and 2 November 1988), below)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The international boundary between Israel and Syria remains to be negotiated, but the armistice line established by the 1949 Syria-Israel armistice agreement has generally been accepted as the de facto boundary. The demilitarised zone, in which the United Nations disengagement observer force operates, lies well to the east of this line. (HC Debs., vol. 129, Written Answers, col. 127: 8 March 1988)

Part Eight: II. A. State territory and territorial jurisdiction—territorial jurisdiction—territorial sovereignty

(See also Part Eight: II. D. (*Wood Pulp* case) and Part Eleven: II. A. 1. (item of 2 November 1988), below)

In a Note dated 9 September 1987, the UK Permanent Mission to the UN in Geneva requested that the International Telecommunications Union bring the contents of the Note to the attention of Member States. The Note rejected declarations made by the Argentine Republic on ratifying the International Telecommunications Convention in 1982 in so far as these related to the Falkland Islands and South Georgia and the South Sandwich Islands. The Note continued:

The Government of the United Kingdom have no doubt as to British sovereignty over the Falkland Islands and South Georgia and South Sandwich Islands. As stated in the declaration (No. 102) made by the United Kingdom Delegation at the time of the signing of the Final Protocol at the Nairobi Plenipotentiary in 1982, the Falkland Islands and South Georgia and the South Sandwich Islands are, and remain, an integral part of the territories for the international relations of which the Government of the United Kingdom is responsible.

(UKTS No. 62 (1987); Cm. 345, p. 24)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

. . . we recognise Canada's full sovereignty over the islands in the Canadian archipelago. We maintain contact with the Canadian Government on the matter of surrounding waters . . .

(HL Debs., vol. 492, col. 624: 26 January 1988)

In reply to questions, the Minister of State, Foreign and Commonwealth Office, wrote:

Since 27 April 1950 we have recognised Jordanian sovereignty over the West Bank. No other Government have formally claimed sovereignty to this area, except those parts which Israel purports to have incorporated within the municipal boundaries of Jerusalem.

(HC Debs., vol. 129, Written Answers, col. 127: 8 March 1988)

No Government have made a specific, formal claim to sovereignty over the Gaza strip.

(Ibid.)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

Our current advice is that the territory of the western Sahara is disputed and the United Kingdom regards sovereignty as undetermined.

(HC Debs., vol. 131, Written Answers, col. 250: 15 April 1988)

In the course of a debate on the subject of children abducted from the United Kingdom, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Timothy Eggar, stated:

While the children are in the United Kingdom they are, naturally, subject to British legislation and the jurisdiction of British courts. Once abroad, the children are removed from British jurisdiction and are subject to the jurisdiction of the country in which they find themselves. The children's return to the United Kingdom can then be achieved only through the courts of the country to which they have been taken. We are constrained, however regrettably, by the basic fact that courts in one country have no obligation to recognise custody orders made by the courts of another country. That is the very real and fundamental problem that we cannot overcome.

(HC Debs., vol. 131, col. 529: 15 April 1988)

In reply to the question who would be in charge of emergency arrangements outside the site if there were to be an accident to a US nuclear weapon in this country, the Minister of State for Defence Procurement, Lord Trefgarne, stated:

. . . in the extremely unlikely event of a United States nuclear weapon accident in this country, the United Kingdom would retain sovereign rights over its territory and territorial waters. A formal arrangement with the United States Government exists for this purpose.

. . . the arrangements are perfectly straightforward. The United Kingdom will retain sovereignty over its territory and territorial waters, as the noble Lord would expect. Therefore there is no question of the United States acquiring sovereignty, or something similar . . .

(HL Debs., vol. 496, cols. 1127-8: 11 May 1988)

In reply to a question about the conflict in Eritrea, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We recognise the territorial integrity of Ethiopia within its existing frontiers.

(HC Debs., vol. 136, Written Answers, col. 59: 27 June 1988)

On the occasion of the signing of the Final Acts of the World Administrative Radio Conference in Geneva on 7 October 1988, the Argentine Republic made the following statement:

(a) The Argentine Republic, exercising its sovereign rights over the Malvinas Islands, the South Georgia Islands and the South Sandwich Islands does not

recognize the allotments (or the assignments deriving therefrom) appearing on behalf of the United Kingdom of Great Britain and Northern Ireland in the plans established by this Conference to provide services in the territories mentioned and denies any right on the part of the United Kingdom to submit requirements, to notify the bringing into use of the allotments referred to or to set up any installation therein.

The Argentine Republic therefore reaffirms its inalienable and indefeasible sovereign rights over the Malvinas Islands, the South Georgia Islands and the South Sandwich Islands, which constitute an integral part of its territory.

The United Nations General Assembly adopted Resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9 and 39/6 recognizing the existence of a sovereignty dispute on the Malvinas question and urging the Argentine Republic and the United Kingdom to resume negotiations with a view to reaching, as soon as possible, a peaceful and definitive solution to the dispute and the remaining differences relating to this matter through the good offices of the Secretary-General of the United Nations, who is to inform the General Assembly of the progress made. The 40th United Nations General Assembly adopted on 27 November 1985, Resolution 40/21 reiterating its appeal to both parties to resume negotiations, an appeal that was further repeated in Resolutions 41/40 and 42/19.

(b) The Argentine Republic further reserves the right to adopt throughout its territory such measures as it considers necessary to ensure the provision of its telecommunication services should the interests of the nation be affected by the decisions taken at this Conference or by the reservations expressed by other countries.

In response, the UK representative stated:

With reference to Statement No. 40 by the Argentine Republic and to all other statements and reservations by the Argentine Delegation during the proceedings of this Conference concerning the Falkland Islands, and South Georgia and South Sandwich Islands, the Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to United Kingdom sovereignty over the Falkland Islands and South Georgia and South Sandwich Islands.

The United Kingdom is the recognized Administration for these territories and, as such, has the sole right to submit requirements in respect of them: all allotments (or assignments deriving therefrom) relating to these territories which, on behalf of the United Kingdom Administration, are contained in the Plans established by this Conference, or in other Conference documents, are therefore not open to question.

(Texts provided by the Foreign and Commonwealth Office)

In concluding his speech in the UN General Assembly on 17 November 1988 on the subject of the Falkland Islands, the UK Permanent Representative to the UN, Sir Crispin Tickell, stated:

I much regret that the effect of this debate and the draft resolution before us is to emphasise not what we can build upon but the one issue of irreconcilable difference between Britain and Argentina: that of sovereignty. We are not ready to enter into negotiations on—and I quote from the draft resolution—‘all aspects on the future of the Falkland Islands’. As President Alfonsín has told us, that means the beginning of negotiations which would represent the method by which Argentina

could—again I quote—‘recover’ its sovereignty over the Islands. But sovereignty over the Islands is not for negotiation. It is ours. The Islanders wish to remain under it. Calls for negotiations which could bring it into question are pointless. To the vast majority of delegations here who maintain friendly relations with both Britain and Argentina, and who would dearly like to see us resolve our differences, I say very simply this. Refrain from giving your support to this misleading resolution, and allow us and the Argentines to try to resolve the practical problems between us in a practical way.

(Text provided by the Foreign and Commonwealth Office; see also A/43/PV.54, pp. 34–5)

In explanation of vote on 28 November 1988 in the UN Special Political Committee considering the report of the special committee to investigate Israeli practices in the occupied territories, the UK representative, Mr J. Watt, stated:

A number of resolutions just adopted contain a reference to ‘occupied Palestinian territory’ or to ‘Palestinian territory occupied by Israel since 1967’. My delegation understands the language concerned to signify the West Bank, East Jerusalem and the Gaza Strip. In supporting any resolution containing such language my delegation does not imply any change in its view of the status of those territories.

(Text provided by the Foreign and Commonwealth Office; see also A/SPC/43/SR.34, p. 21)

Part Eight: II. C. *State territory and territorial jurisdiction—territorial jurisdiction—concurrent territorial jurisdiction*

(See also Part Eleven: II. A. 1. (item of 2 November 1988), below)

The following letter, dated 29 February 1988, was sent to the Chairman of the UNCTAD Committee on Tungsten by the Legal Adviser to the US Mission to International Organizations, Geneva:

With reference to the statement of the delegation of the Union of the Soviet Socialist Republics of the 13th of November 1987 in the 19th session of the UNCTAD Committee on Tungsten, I should like to state the following on behalf of the delegations of the United Kingdom, France and the United States of America.

Annex IV of the Quadripartite Agreement states that, provided matters of security and status are not affected, permanent residents of the western sectors of Berlin may participate jointly with participants from the Federal Republic of Germany in international exchanges. There is, therefore, no reason why such members of the delegation of the Federal Republic of Germany should be listed differently. It is for the Federal Republic of Germany alone to decide on the listings of its delegation.

Thus, the reference to the company ‘Hermann C. Starck Berlin’ on page 3 of the Provisional List of Participants, circulated as document TD/B/C.1 Tungsten/Misc. 1 the 9th of November 1987, is correct as it stands.

Furthermore, the statement from the Soviet delegation contains an incomplete and consequently misleading reference to the Quadripartite Agreement. The relevant passage of that agreement to which the Soviet statement referred provides that the ties between the western sectors of Berlin and the Federal Republic of Ger-

many will be maintained and developed, taking into account that these sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it.

(Text provided by the Foreign and Commonwealth Office)

The following statement was issued to the press on 7 October 1988:

MILITARY PARADE IN EAST BERLIN: ALLIED PROTEST

GDR military units participated today in a demonstration in Berlin. Their equipment included main battle tanks, armoured fighting vehicles, rocket carrying vehicles and launchers and artillery pieces. The Allied Commandants condemn the continuation of these military displays which, particularly against the background of the continued shooting by GDR guards at those seeking refuge in the Western Sectors, are provocative and a violation of the demilitarised status of the city.

(Text provided by the Foreign and Commonwealth Office)

The following note was transmitted on 27 October 1988 to the Secretary-General of the International Telecommunications Union by the Deputy Permanent Representative of the UK Mission, Geneva:

On behalf of the Governments of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America, I have the honour to refer to the letter dated 17 September 1987 from the Permanent Mission of the Union of Soviet Socialist Republics, contained in Notification No. 1240, concerning the extension to the Western Sectors of Berlin of the Regional Agreement Relating to the Use of the Band 87.5–108 MHz from FM Sound Broadcasting (Region 1 and Part of Region 3) (Geneva 1984), the Regional Agreement Concerning the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area (Geneva 1985) and the Protocol Amending the Regional Agreement for the European Broadcasting Area (Stockholm 1961) established at Geneva on 13 August 1985.

In a communication to the Government of the Union of Soviet Socialist Republics, which is an integral part (Annex IVA) of the Quadripartite Agreement of 3 September 1971, the Governments of France, the United Kingdom and the United States, without prejudice to the maintenance of their rights and responsibilities relating to the representation abroad of the interests of the Western Sectors of Berlin, confirmed that, provided that matters of security and status are not affected and provided that the extension is specified in each case, international agreements and arrangements entered into by the Federal Republic of Germany may be extended to the Western Sectors of Berlin in accordance with established procedures. For its part, the Government of the Union of Soviet Socialist Republics, in a communication to the Governments of the Three Powers which is similarly an integral part (Annex IVB) of the Quadripartite Agreement, affirmed that it would raise no objections to such extension.

The established procedures referred to above, which were endorsed in the Quadripartite Agreement, are designed *inter alia* to afford the authorities of the Three Powers the opportunity to ensure that international agreements and arrangements entered into by the Federal Republic of Germany which are to be extended to the Western Sectors of Berlin are extended in such a way that matters of security and

status are not affected. When authorising the extension of the above-mentioned Agreements and Protocol to the Western Sectors of Berlin, the authorities of the Three Powers took such steps as were necessary to ensure that matters of security and status were not affected. With the authorisation of the Governments of the Three Powers concerned, the Federal Republic of Germany coordinates the frequencies with other Government authorities responsible for frequencies used in the Western Sector of Berlin and submits the notices to the International Frequency Registration Board for their registration on behalf of the Western Sectors of Berlin. Such coordination of frequencies and submission of notices do not affect matters of security and status. Accordingly the Berlin declaration made by the Federal Republic of Germany is valid and the Agreements and Protocol apply to the Western Sectors of Berlin, subject to Allied rights and responsibilities.

Moreover, the Soviet communication contains an incomplete and consequently misleading reference to the Quadripartite Agreement. The relevant passage of that Agreement to which the Soviet communication referred provides that the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these Sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it. The use of country symbol 'D' for the Western Sectors of Berlin is consistent with this situation.

It is requested that the contents of this note be published in the next Notification.

(Text provided by the Foreign and Commonwealth Office)

Part Eight: II. D. *State territory and territorial jurisdiction—territorial jurisdiction—extra-territoriality*

(See also Part Four: VII. (Criminal Justice Act 1988, s. 134), above, and Part Eleven: II. A. 1. (item of 2 November 1988), below)

In 1988, the European Court of Justice decided cases brought by 41 wood pulp producers, and two of their trade associations, all having their registered offices outside the Community, against the European Commission, which had decided on 19 December 1984 (*Official Journal*, 1985, No. L 85, p. 1) that they were engaged in concerted practices on prices. The Government of the UK was given permission to intervene in the Court action in order to support the Commission in certain of the cases. The pleadings of the UK not having been made public (see Part Twelve: II. I. 2., below), the following extracts are taken from a summary of them in the *Report for the Hearing* prepared by Judge-Rapporteur R. Joliet:

The *United Kingdom*, intervening in support of the Commission in Cases 114/85 and 125 to 129/85, concludes from an examination of the relevant case-law of the Court and, in particular, from the *Béguelin* and *ICI* judgments, that the Commission has jurisdiction to apply Community law in two possible situations: first of all, in relation to an undertaking having its registered office in the Community even if it enters into an agreement with, or acts in concert with, undertakings situated outside the territory of the Community, and secondly in relation to undertakings situated outside the Community where, in certain circumstances, they may be held

liable for the conduct of their subsidiaries. In the latter situation, the Court lays emphasis on prohibited acts being done or implemented within the territory of the Community and not on the effects felt within the Community of acts carried out elsewhere.

The United Kingdom submits that the second possibility may be extended to cases in which an undertaking established outside the Community employs an agent within the Community. Hence any acts which the agent carries out in accordance with the directions of the undertaking he represents may properly be regarded as acts of that undertaking. That is merely an illustration of the application of the principle of territoriality.

In this case, although the basis on which the Commission intended to exercise its jurisdiction is not clearly set out in the decision, the United Kingdom considers that the Commission was indeed entitled to apply Community law. The key factor is whether a foreign undertaking is giving effect to an agreement within the Community, and not whether an agreement between foreign undertakings has certain effects within the Community. The United Kingdom point out that the United States companies involved in Case 114/85 and the Canadian companies involved in Cases 125 to 129/85 traded in the Community through their subsidiaries or through agents who played a central role. Those agents, who carried on various activities within the Community, have been the essential means by which the agreements and concerted practices prohibited under Article 85 of the Treaty have been implemented within the Community.

However, the United Kingdom considers that the exercise of jurisdiction by the Commission is not justified where the undertakings have been selling into the Community without using agents. That is why the United Kingdom does not share the Commission's position with regard to KEA. There is no evidence in the file on the case that KEA [US trade association] itself was exporting to the Community through agents. Accordingly, KEA has not engaged in anti-competitive acts within the Community.

The *Report of the Case* later went on:

2. The problem under international law

The *United Kingdom* for its part considers, in the first place, that the fact that the EEC Treaty is silent as to scope of jurisdiction does not mean that the Community is not committed to the principles of international law in matters of jurisdiction. The United Kingdom points out that the 'effects doctrine', which may be defined as a doctrine allowing a State to claim jurisdiction over conduct occurring outside its territory but causing direct, foreseeable and substantial effects within its territory if those effects are a constituent element of the infringement, is the subject of controversy under international law and has never been accepted as such by the international community.

Moreover, the Commission itself has always stated that the only two legal bases of jurisdiction in international law are the principles of nationality and territoriality (see the Comments on the Export Administration Act of 22 June 1982—International Legal Materials 1982, p. 891).

For that reason, the United Kingdom considers that the Commission has infringed the principles of international law by applying Community law to KEA. On the other hand, the exercise by the Commission of jurisdiction over the

producers concerned is quite justified under international law, in so far as it is not based on the 'effects doctrine'.

(*Re Wood Pulp Cartel: A. Ahlström Oy and others v. EC Commission*; text provided by the Foreign and Commonwealth Office)

In commencing a statement about war crimes committed during the Second World War, the Secretary of State for the Home Department, Mr Douglas Hurd, observed:

The House will be aware of recent allegations that suspected war criminals have found haven in this country. Lists of names have been sent to us by the Simon Wiesenthal Centre and others. Inquiries conducted by my Department suggested that some of the people named are still living in this country, and we undertook to consider what action, if any, should be taken.

The legal position is as follows. We would normally deal with alleged crimes in foreign countries by way of extradition. However, all the cases in question relate to crimes committed in territories now controlled by the Soviet Union, with whom we have no extradition treaty. Nor do the courts in the United Kingdom at present have jurisdiction to try offences of murder and manslaughter committed abroad when the accused was not a British citizen at the time of the offence. If we were to prosecute in these cases we should need to legislate to extend the jurisdiction of our courts.

(HC Debs., vol. 127, col. 28: 8 February 1988; see also HL Debs., vol. 493, cols. 32-4: 8 February 1988)

In reply to a question about the policy towards the United States' exerting extraterritorial controls over UK firms, the Minister for Trade, Mr Alan Clark, stated:

We have asserted on many occasions our rejection of United States claims to extra-territorial jurisdiction which infringe on United Kingdom sovereignty.

...
There is no compulsion on British firms to accord with the provisions of the extra-territorial legislation in the United States. Any British company that wants to resist it will receive the fullest support of my Department.

...
The British Government have made absolutely no concessions to the United States' extra-territorial provisions. If a British firm feels that its commercial interests are best served by acceding to the provisions, that is a matter for it. If it wishes to enlist our support in resisting them we should be very glad to offer it. The United Kingdom does not accept the provisions and has always rejected them.

(HC Debs., vol. 133, cols. 301-2, *passim*: 11 May 1988)

In reply to a question on the subject of the adverse repercussions for UK trade of the US Export Administration Act, the Minister for Trade wrote:

The Government have rejected on many occasions United States claims to extra-territorial jurisdiction—including those in the United States Export Administration Act—which infringe on United Kingdom sovereignty. Any British firm experiencing difficulties in the course of legitimate trading in or from the United

Kingdom should contact the Department of Trade and Industry. Measures to help resolve specific problems will be considered on a case-by-case basis as they arise. Under the Protection of Trading Interests Act 1980, the Secretary of State has discretionary powers to prevent United Kingdom companies complying with foreign claims to jurisdiction in the United Kingdom.

(HC Debs., vol. 137, Written Answers, col. 268: 13 July 1988)

The following paragraphs appeared in a letter, dated 2 August 1988, sent to Congressman Udall by the UK Chargé d'Affaires in Washington, Mr B.L. Crowe:

1. I understand that the House Interior Committee is holding hearings on 3 August on the Anti-Apartheid Amendments Act of 1988.
2. The EC and the UK have already made clear to the Department of State their objections to the extraterritorial aspects of the draft legislation. These are unacceptable to the British Government as a matter of law and policy. The EC Commission and Member States made an oral *démarche* to the Department of State on 8 June. We supported these representations in a Diplomatic Note which was delivered to the State Department on the same day. My Ambassador subsequently wrote to draw attention to our concerns to the chairmen and ranking minority members of the committees of the House of Representatives then considering the legislation.

(Text provided by the Foreign and Commonwealth Office)

In reply to questions in the House of Lords about this letter, the Minister of State for Defence Procurement, Lord Trefgarne, stated:

I can confirm that the letter concerned represented the view of the British Government.

. . .
 . . . the issue at stake was not the question of sanctions on South Africa but of the right of Congress to pass legislation which has effect outside the territorial United States. That is a matter upon which the British Government have made representations both to the United States Administration and the United States Congress on a number of occasions in recent years because unhappily such proposals have come forward in various measures proposed in the American Congress.

He also added:

. . . it is indeed established practice for letters of this kind to be sent. In fact it is the way things are done 'on the Hill', as it is called in Washington. Representations are made direct to members of Congress, be they Senators or Members of the House of Representatives. It is sometimes done by officials of the embassy, sometimes by the ambassador himself and sometimes by Ministers themselves in this Administration.

(HL Debs., vol. 500, cols. 872-4, *passim*: 12 October 1988)

Part Eight: III. B. State territory and territorial jurisdiction—acquisition and transfer of territory—transfer

(See Part Eight: II. A. (item of 25 August 1987), above)

Part Eight: IV. *State territory and territorial jurisdiction—regime under the Antarctic Treaty*

(See also Part Nine: IX. (item of 26 July 1988), below)

In reply to questions, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Protection of all Antarctic life forms is already provided for under the Antarctic treaty agreed measures for the conservation of Antarctic flora and fauna 1964, the convention for the conservation of Antarctic seals 1972, and the convention for the conservation of Antarctic marine living resources 1980. Both conventions have been ratified by the United Kingdom, while effect was given to the agreed measures by the Antarctic Treaty Act 1967.

The Antarctic treaty 1959 makes no mention of minerals resources, but the consultative parties, including the United Kingdom, have recognised that unregulated minerals activity would be undesirable. We are consequently participating in the negotiation of an Antarctic minerals regime which would ensure that if minerals activity ever takes place it should do so within a legal framework of operational control and environmental protection.

(HC Debs., vol. 128, Written Answers, cols. 424-5, *passim*: 29 February 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

There is no automatic requirement for the Antarctic treaty to be reviewed in or after 1991.

(HC Debs., vol. 129, Written Answers, col. 290: 10 March 1988)

The following Explanatory Note accompanies the Antarctic Treaty (Specially Protected Areas) Order 1988 (Statutory Instrument 1988 No. 587) which entered into force on 22 April 1988. The areas involved are Cape Hallett, Victoria Land, North Coronation Island, South Orkney Islands, Lagotellerie Island, South-West Antarctic Peninsula, and 'New College Valley', Caughley Beach, Cape Bird, Ross Island.

This Order designates as Specially Protected Areas for the purposes of the Antarctic Treaty Act 1967 four areas in the Antarctic which have been recommended for inclusion in Annex B to the Agreed Measures for the Conservation of Antarctic Fauna and Flora (Schedule 2 to the Act) in pursuance of Article IX of the Antarctic Treaty. One of these areas (Specially Protected Area No. 7) encompasses a smaller area designated in the Antarctic Treaty (Specially Protected Areas) Order 1968, and the present Order therefore deletes the description of the smaller area in the 1968 Order.

On the occasion of the signature on 2 June 1988 of the Final Act of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources, the head of the UK delegation, Mr A.D. Watts, Legal Adviser, Foreign and Commonwealth Office, stated in part:

It is with a sense of relief that I find myself taking the floor on this occasion. It

has been a long time since we first met here in Wellington almost six years ago: and at times it has seemed an even longer haul than that. There have been times when it looked as though we had set ourselves an impossible task. That we have in the event today been able to agree upon a final report and a Final Act adopting the Convention on the Regulation of Antarctic Mineral Resources is due to the willingness of all delegations to put the interests of Antarctica above their more narrow national interests.

We must now all go home and consider carefully whether we can sign the Convention which we have today adopted, and in due course ratify it. It may be that when we come to signature and ratification we may feel it necessary to attach to our signature or instruments of ratification statements or declarations of various kinds, although not of course any which amount to reservations. I will not, therefore, on this occasion attempt to forecast the kind of statements or declarations, if any, which the United Kingdom may feel it necessary to make on those later occasions. There are, however, one or two matters to which it is only right for me to refer briefly on this occasion.

First, it has been of the utmost importance to all of us, and to my delegation in particular, to have a clear idea of the area of application of our Convention. This has proved a very difficult subject to settle satisfactorily. We began detailed discussion of it at the second round of negotiations in January 1983, and it has only been at this final round—and at a fairly late stage in the round at that—that we have finally been able to arrive at a solution satisfactory to all delegations. Some very difficult issues have had to be tackled, and I believe that all delegations deserve our collective thanks for the spirit in which they have approached this problem. The result has been a clear agreement that Antarctic mineral resource activities conducted within the area described in Article 5(2) can only take place in accordance with the provisions of this regime. We do not believe that it prejudices the question of mineral activities south of 60° South but outside that special area.

Taking a broader view of the outcome of our negotiations, we have all had to come to a number of difficult accommodations throughout the regime. The interests involved have been diverse. By now, we all know them very well. A number stand out as being of particular importance. There has been the interest of the States which do not recognise claims to sovereignty in Antarctica, and who have had strong reservations about anything in the regime which admits any special position for the claimant States. There have been the interests of the developing countries, which have grown in number during our negotiations, and the interests of those States which might expect, in the far distant future, to be more likely to have Operators interested in the high risk venture of conducting mineral resource activities in Antarctica. There has also been the direct interests of the relevant claimant States in the claimed areas of Antarctica, an interest which is for each of those States the most direct interest in the particular area over which it asserts or claims sovereignty.

The problems arising from the existence of these assertions of and claims to sovereignty have from the outset been among the most important and sensitive in these negotiations: in some respects they have dominated them. The outcome has all along had to be one which, both in substance and in form, struck a balance between those divergent views. This is not the occasion for an analysis of how that balance has been struck in the Convention, although I would just mention the cardinal importance for all delegations of Article 9 of the Convention and of its parent

provision in Article IV of the Antarctic Treaty. Let me, rather, simply say that, in the view of my delegation, a balance has been struck which is at least sufficiently acceptable to have allowed us to proceed to the adoption of the Convention.

In this general context, however, there is one particular matter to which I must refer. Throughout these negotiations my delegation—like many others—has been very conscious of the problems created by the fact that in a part of Antarctica the territorial claims of the United Kingdom, Argentina and Chile overlap each other, totally or partially. The effective operation of the regime requires that various practical problems associated with these overlapping claims be satisfactorily resolved between the three States. To that end, during these negotiations the three delegations, acting within the framework of Article IV of the Antarctic Treaty and bearing in mind also Article 9 of the Convention which we have just adopted have exchanged views informally on certain aspects of the proposed Convention related to the area of our countries' overlapping claims to territorial sovereignty. My delegation intends, exclusively for the purpose of facilitating the application of the Convention in that area, to continue such exchanges with representatives of Argentina and Chile. By such means we expect that the three States will be able to ensure that, when the Convention enters into force and becomes fully operational, it will do so effectively and harmoniously, and in full accord with the objectives and principles which underlie it. My delegation must state that neither the informal exchanges which have taken place between the three delegations concerned, nor any future exchanges between us in this context, are to be construed as a diminution by the United Kingdom of its asserted rights to territorial sovereignty in Antarctica or to the exercise of coastal state jurisdiction in Antarctica, or as prejudicing its rights, or as recognition of or support for the position of either or both of the other two States with regard to territorial sovereignty or coastal state rights and jurisdiction in Antarctica.

With those thoughts, Mr Chairman, my delegation begins the process of looking forward to the future effective operation of the Convention which we have just adopted. We are all aware that no assumptions can be made about the success of that future. We shall have to continue to work as hard for a successful future as we have worked for a successful Convention. If we continue to put the interests of Antarctica first, and in particular the interests associated with the protection of its incomparable environment, I have no doubt that the work which we have begun over these last six years will serve our various States well through the decades ahead. The secret of the Antarctic Treaty system is that we exercise forbearance. If any of us pushes to the extreme positions which we hold, the system will cease to work. It is only by forbearance in that respect that the system can survive. We have all exercised that forbearance during these negotiations, for which my delegation wishes to express its thanks to all other delegations. It will only be by continuing that forbearance that the Antarctic Treaty system will continue to serve our common interest in the well-being of Antarctica throughout the years ahead.

(Text provided by the Foreign and Commonwealth Office)

In the course of the consideration by the House of Commons First Standing Committee on Statutory Instruments of the draft Antarctic Treaty (Agreed Measures) (No. 2) Order 1988, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Affairs, Mr Timothy Eggar, stated:

The Antarctic Treaty Act 1967 is designed to give effect to measures to protect Antarctic fauna and flora from unnecessary human interference. That has been agreed by all the contracting parties to the treaty. Those agreed measures have been amended to oblige participating Governments to prohibit entry by their nationals without a permit into any designated specially protected area. That is reflected by the amendment of schedule 2 to the Act, by article 2 of the Antarctic Treaty (Agreed Measures) Order 1988, which came into force on 22 April. The purpose of the draft Antarctic Treaty (Agreed measures) (No. 2) Order 1988 is to give effect in our law to the prohibition required by that amendment. It specifies the necessary new offences under the Act and lays down the maximum penalties that may be imposed in each case.

Since 1961, the contracting parties to the Antarctic treaty have collaborated closely to develop effective and adequate environmental safeguards for Antarctica. A responsible attitude towards the environment is one of the many tenets that underpin the Antarctic treaty system and which the order will reinforce.

(HC First Standing Committee on Statutory Instruments etc., 16 June 1988, col. 3)

Later in the debate, Mr Eggar observed:

Marine biology is covered by the Convention on the Conservation of Antarctic Marine Living Resources agreement in 1980, which applies to marine living resources in the area south of the Antarctic convergence and provides for regulation of fisheries in the waters around that area. Anxiety about previously unregulated fishing in areas around South Georgia and elsewhere motivated Britain and others to negotiate CCAMLR, and we have been working under that convention to try to improve conditions in the area. For example, in 1985, direct fishing for Antarctic cod was banned and in 1987 further significant progress was made with agreement being reached on the total allowable catch for the major exploited species and for a closed season. I assure the honourable Gentleman that the Government are committed to continuing efforts to improve the situation under the CCAMLR regime.

(Ibid., cols. 8-9)

The following background paper was issued by the Foreign and Commonwealth Office to accompany a press release dated 30 August 1988 to mark the forthcoming meeting to review the Convention for the Conservation of Antarctic Seals, 1972:

The Convention for the Conservation of Antarctic Seals (CCAS) was negotiated in 1972 and entered into force in 1978. Article 7 of the Convention requires that a meeting be held every five years thereafter to review the operation of the Convention. By consensus it was decided that a review meeting was not necessary in 1983. The 1988 meeting is, therefore, the first occasion that there has been a meeting under the CCAS since its negotiation.

The purpose of the Convention is twofold. To safeguard all species of Antarctic seals. To ensure that if the long dormant Antarctic sealing industry is ever revived, the killing of certain species will be prohibited and the taking of other species will be subject to strict limits. The take of seals, mostly for research purposes, has never exceeded 10 per cent of the permissible catch for any species since the

Convention entered into force. The meeting is expected to look critically at a Convention which is now sixteen years old in the light of improving scientific understanding and the changing approach to wildlife conservation conventions that has developed since 1972.

The contracting parties to the Convention are Argentina, Australia, Belgium, Chile, France, The Federal Republic of Germany, Japan, Norway, Poland, South Africa, The Soviet Union, the United Kingdom and the USA. The meeting, which will take place at the QEII Conference Centre, is being held in Britain as the United Kingdom is the Depositary for the Convention. The FCO is acting as host.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question whether South Georgia and Thule were covered by the Falklands fisheries protection zone, the Minister for Defence Procurement, Lord Trefgarne, stated:

South Georgia is certainly not included in this zone. There is a convention on the conservation of Antarctic marine living resources which covers South Georgia waters.

(HL Debs., vol. 500, col. 383: 28 July 1988)

The following document, dated 18 October 1988, was prepared by the Polar Regions Section, South America Department, Foreign and Commonwealth Office:

CONVENTION ON THE REGULATION OF ANTARCTIC MINERALS RESOURCE ACTIVITIES: A COMMENTARY ON ENVIRONMENTAL ASPECTS

1. The Convention was adopted in Wellington on 2 June 1988. It will be open for signature for one year from 25 November 1988 and thereafter for accession. The Convention will enter into force following sixteen ratifications or accessions (out of a possible 20) which shall include, *inter alia*, all Claimant states, the United States and the Soviet Union.

2. *Stages of activity*. The Convention provides for three stages of mineral activity: prospecting, exploration and development. *Prospecting* is defined as activity aimed at identifying areas of mineral resource *potential* and excludes deep dredging or excavations or drilling to depths exceeding 25 metres. The aim is that prospecting should have no greater environmental impact than scientific research activity of a similar character. Prospecting activity accords no rights to the prospector. *Exploration* is defined as activities aimed at the *identification and evaluation* of specific mineral resource occurrences or deposits. *Development* is defined as activities aimed at the *exploitation* of specific mineral resource deposits. A permit to explore carries with it the expectation that the permit holder will proceed to development unless he voluntarily withdraws or it is decided otherwise in accordance with the Convention. All three stages of activity are defined so as to include logistic activities associated with them.

3. *Institutions*. The Convention provides for four institutions:

(i) a *Commission* consisting of the 22 present Antarctic Treaty Consultative

Parties, any other Party to the Convention engaged in substantial and relevant research in the area, and any other party sponsoring mineral resource activity;

- (ii) a Scientific, Technical and Environmental *Advisory Committee* consisting of all Parties to the Convention;
- (iii) *Regulatory Committees* established by the Commission to regulate exploration and development activity in a specific area, consisting of ten members of the Commission including the relevant Claimant and additional Claimants up to a maximum of four, the USA and USSR and representation of developing countries; and
- (iv) a Special Meeting of Parties consisting of all Parties to the Convention (see 4(i) below).

4. *Decision-making points.* The Convention provides for four important decision making points:

- (i) the decision by the Commission to identify and open an area for exploration and development (in addition to the Advisory Committee, the Special Meeting of Parties is required to report their views and any conclusions to the Commission which shall give them special weight in reaching its decision); an affirmative decision leads to the establishment of a Regulatory Committee;
- (ii) adoption by the Regulatory Committee of guidelines identifying the general requirements, including environmental requirements, which any exploration and development activity within its area would need to meet;
- (iii) the approval of a Management Scheme and the issue of an associated exploration permit, applicable to a particular proposal to explore and develop an identified mineral deposit by a particular operator;
- (iv) the issue of a development permit to a particular operator.

5. *Decision-making procedures.* A decision to identify and open an area for exploration and development is taken in the Commission by consensus. If one member of the Commission objects the Chairman of the Commission is enjoined to seek a reconciliation of the differences. The Regulatory Committee decision referred to at 4(ii) above is taken by a two-thirds majority (of 10) including half of the Claimant group (of 4) and half of the non-Claimant group (of 6). The Regulatory Committee decisions referred to at 4(iii) and (iv) above are taken by a two-thirds majority, including a simple majority of the Claimant group (ie 3 out of 4) and the non-Claimant group (ie 4 out of 6).

6. *Environmental judgements, procedures and information available.* Article 4 of the Convention provides for certain principles of an environmental character concerning judgements on mineral activity. Environmental impact assessments have to be prepared and provided to the relevant institutions for any proposed mineral activity. Article 26 sets out the general functions of the Advisory Committee and, in paragraph 4, what it shall do prior to the taking of any of the decisions referred to in paragraph 4 above. . . . Article 34 governs the accordence of observer status to international organisations, including non-governmental organisations and Article 25(3) provides for the receipt and consideration of views on matters on the agenda of the Advisory Committee from international organisations having an interest in them. Article 27 sets out the scope of reports to be prepared by the

Advisory Committee. Articles 21(4), 27 and 31(3) describe the information to be made publicly available about the work of the Commission, the Advisory Committee and Regulatory Committees respectively. . . .

7. *Liability*. Article 8 (read together with Articles 1(15) and 37(3)) sets out general provisions relating to liability concerning mineral activity including prospecting. Article 8(7) provides for the future negotiation of a separate Protocol relating to liability, and Article 8(9) provides that no application for an exploration or development permit shall be made until the Liability Protocol is in force for the Party lodging the application. Article 6 of the Annex to the Convention provides for the imposition of mandatory provisional environmental measures pending final settlement of a dispute and for a special 'fast-track' procedure in cases of emergency. These provisions apply to prospecting as well as to exploration and development. . . .

COMMENT

8. The Convention breaks much new ground in international environmental law and sets out the strongest measures, coupled with relevant procedures, for environmental protection that have ever been included in an international agreement. Of particular note are:

- (i) the requirement for adequate information resulting from the coupling of the provisions contained in Article 4(1) and Article 26(4)(a). (Other conservation agreements traditionally require that decisions be made in accordance with the best scientific evidence *available* at the time of the decision irrespective of whether the available evidence is sufficient to make the decision in question; the Convention, on the other hand, requires that an affirmative answer should be given to the question 'is enough known to make the required judgement?'. A decision to proceed with mineral activity in the face of advice that insufficient information existed to make the judgement would be open to challenges as not being in accordance with the Convention.);
- (ii) the requirement that a decision to identify and open an area for exploration and development is to be taken by consensus. (The requirement for reconciliation in the event of there being an objection amounts to no more than a recognition of what would happen in practice and does not prevent the objector from maintaining his veto if he so desires.);
- (iii) the requirement that any report of the Advisory Committee 'shall reflect the conclusions reached and all views expressed'. (Thus the Advisory Committee does not itself take decisions relating to whether or not mineral activity should proceed. What is expected of it is that it shall provide as many views as are expressed, whether they be positive or negative, on the matter under consideration. Article 27 requires that Advisory Committee reports should be rapidly available to the public. The final decision is one that involves an overall balancing and judgement of the political and economic, as well as environmental aspects of the matter. It is therefore proper that such decisions should be taken in the relevant political forum.);
- (iv) that no exploration and development activity can take place until it is affirmatively decided that it shall. (This requirement is the opposite to

that which traditionally pertains in, for example, fishery agreements where the activity proceeds unless it is decided that it shall be modified or stopped. Thus the onus of proof under the Convention is on the potential operator to show that the activity in question will *not* cause significant environmental damage rather than on the regulatory institutions to show that regulation is necessary.).

9. Environmental pressure groups view the negotiation of the Convention as having been a mistake from the start. The grounds adduced are that there was a practical alternative—the negotiation of a binding moratorium—and that the conclusion of the Convention has made possible the exploitation of Antarctic minerals which would not have been possible without it.

10. The Antarctic Treaty Consultative Parties (ATCPs) discussed the possibility of a moratorium in 1972, 1975, 1976, 1977 and 1979. On none of these occasions was there anything approaching a consensus in favour of a moratorium. At no stage was it a practical alternative.

11. The second argument adduced against the Convention that it has made possible that which would otherwise not have been possible—is tenable only for so long as *no-one*, whether a commercial operator or a government, is prepared, in the absence of a regime, to take a risk in the expectation that, in the end, any objection could be overcome. At the heart of the ATCPs' discussion on this issue were two questions: firstly, was there a consensus among ATCPs that they would bind themselves, and could bind their operators not to take the first step towards the exploitation of Antarctic minerals, ie prospecting? and secondly, if there was no consensus on the first question, was there a consensus that the Antarctic Treaty System could survive the strain that would be imposed on it if unsanctioned prospecting activity were to take place?

12. These questions were closely debated at two meetings in 1979 against a background that most ATCPs needed to be convinced that the absence of a consensus in favour of a moratorium *necessarily* carried with it the need to negotiate a minerals regime. It was, therefore, with some reluctance that they reached a consensus conclusion around five propositions: that there could be no assurance that risks would not be taken; that the Antarctic Treaty System would not survive the taking of such risks; that, consequently, the risks attendant on doing nothing were not acceptable; that, therefore, the attempt to negotiate a regime had to be made and, lastly, that such a regime could not prejudice whether mineral activity in Antarctica would or would not take place.

13. The British Government does not accept as if it were a statement of fact, that the environmental risks of Antarctic mining *are* unacceptable. It is, though, prepared to accept, without any reservation, that they *could be* unacceptable. This Convention provides a means, unparalleled elsewhere in international law, for deciding whether, in any given case, the risks are acceptable or not on the basis of predicted impact and in accordance with a procedure which must give the benefit of doubt to the protection of the environment and not to the potential operator.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question if there have been any initiatives taken by any contracting parties to the 1959 Antarctic Treaty, under Articles IX and XII, to modify the prohibition on the disposal of nuclear waste in the Antarctic

territories under Treaty Article V, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

No such initiative has been taken. At the VIII Antarctic treaty consultative meeting held in Oslo in 1975 the consultative parties noted the increasing production of nuclear materials and the growing concern over the disposal of nuclear waste. Against this background the consultative parties recalled their commitment to article V of the Antarctic treaty and adopted recommendations VIII-12 to the effect that no one should dispose of radioactive waste in the Antarctic treaty area.

(HC Debs., vol. 139, Written Answers, col. 408: 27 October 1988)

In reply to questions, the Minister of State, Foreign and Commonwealth Office, wrote:

The preamble to the Antarctic treaty calls for Antarctica to be used 'exclusively for peaceful purposes'. In our view, non-governmental visits and tourist developments in Antarctica fall into this category. We therefore do not object to them, as long as they comply with the relevant provisions of the Antarctic treaty, and measures adopted under it.

...

Any proposed amendment to the Antarctic treaty approved by majority vote at a conference convened under article XII of the treaty would need to be ratified by all Antarctic treaty consultative parties in order for it to enter into force. We do not, therefore, believe that majority voting at such a conference is likely to have a crucial effect on the future of the treaty.

(HC Debs., vol. 142, Written Answers, col. 333: 1 December 1988)

Part Nine: I. A. *Seas, waterways, ships—territorial sea—delimitation*

(See also Part Nine: I.B. 4., below)

The Territorial Sea (Limits) Order 1987 (1987 No. 1269) came into force on 1 October 1987 pursuant to powers in the Territorial Sea Act 1987 which came into force on the same day (see UKMIL 1987, pp. 594-5). The Order reads in substantial part as follows:

2. The seaward limit of the territorial sea adjacent to the United Kingdom between Point 1 and Point 6 indicated in the Schedule to this Order shall consist of a series of straight lines joining, in the sequence given, Points 1 to 6 indicated in the Schedule to this Order.

3. The seaward limit of the territorial sea adjacent to the United Kingdom shall be the median line where the baselines from which the breadth of the territorial sea adjacent to the United Kingdom is measured are less than 24 nautical miles from the baselines from which the breadth of the territorial sea adjacent to the Isle of Man is measured.

4. In this Order:—

- (a) 'straight line' means a loxodromic line;
- (b) all positions given by means of co-ordinates are defined on European Datum (1st Adjustment 1950);
- (c) 'median line' is a line every point of which is equidistant from the nearest

points of the baselines from which the breadth of the territorial sea adjacent to the United Kingdom and the Isle of Man respectively is measured.

SCHEDULE

LIST OF POINTS

<i>Point</i>	<i>Position of Point</i>	
1	50°49'23"N	1°15'51"E
2	50°53'47"N	1°16'58"E
3	50°57'00"N	1°21'25"E
4	51°02'19"N	1°32'53"E
5	51°05'58"N	1°43'31"E
6	51°12'04"N	1°53'21"E

An Explanatory Note published with the Order reads as follows:

This Order establishes the seaward limit of the territorial sea adjacent to the United Kingdom in the narrow part of the Straits of Dover and in the vicinity of the Isle of Man. The limit in the Straits of Dover is constituted by straight lines joining the points indicated in the Schedule and follows the line already agreed for the continental shelf by the Agreement of 24th June 1982 with the Government of France (T.S. No. 20 (1983) Cmnd. 8859) where that line is within twelve miles of the baselines of the United Kingdom. The limit in the vicinity of the Isle of Man is the median line.

The following notice was issued by the Hydrographic Department of the Navy in 1987:

TERRITORIAL WATERS AND FISHERIES JURISDICTION CLAIMS.

Former Notice 1971/87 is cancelled.

The following list shows the breadth of sea (measured from the appropriate baselines) claimed respectively as territorial waters and as being under the state's jurisdiction for fishing. The information is compiled from various, sometimes unofficial, sources; the absence of a limit from this list indicates that the information is not held.

The claims are published for information only. Her Majesty's Government does not recognise claims to territorial waters exceeding twelve miles or to fisheries jurisdiction exceeding two hundred miles.

Albania ¹	15**	15	Bahamas*	3	200
Algeria ⁸	12**	12	Bahrain*	3	
Angola	20	200	Bangladesh ⁴	12**	200
Anguilla	3	200	Barbados	12**	200
Antigua and Barbuda	12**	200	Belgium	12	200
Argentina	200	200	Belize*	3	3
Australia ¹	3	200	Benin	200	200
Australian Antarctica	3	12	Bermuda	3	200

Brazil	200**	200	Grenada	12**	200
British Antarctic Territory	3	3	Guatemala	12	200
British Indian Ocean Territory	3	12	Guinea ^{1*}	12	200
British Virgin Islands	3	200	Guinea Bissau ^{1*}	12	200
Brunei	12	200	Guyana	12**	200
Bulgaria	12**	200	Haiti	12	200
Burma ¹	12**	200	Honduras	12	200
			Hong Kong	3	3
Cambodia	12	200	Iceland ^{1*}	12	200
Cameroon*	50		India	12**	200
Canada ¹	12	200	Indonesia ^{2*}	12	200
Cape Verde Islands ²	12	200	Iran ¹	12**	50
Cayman Islands	3	200	Iraq*	12	
Chile ¹	3	200	Irish Republic ¹	3	200
Chinese People's Republic ¹	12**		Israel	6	6
Colombia ¹	12	200	Italy ¹	12	12
Comoros	12	200	Ivory Coast*	12	200
Congo	200	200	Jamaica*	12	12
Costa Rica	12	200	Japan ¹¹	12	200
Cuba ^{1*}	12	200	Jordan	3	3
Cyprus	12	12			
Denmark ¹	3**	200	Kenya ¹	12	200
Djibouti	12	200	Kiribati	12	200
Dominica	12	200	Korea (North)	12**	200
Dominican Republic ¹	6	200	Korea (South) ¹	12 ^{6**}	
			Kuwait*	12	
Ecuador ¹	200	200	Lebanon	12	
Egypt ^{1*}	12**	200	Liberia	200	200
El Salvador	200	200	Libya ⁵	12	20
Equatorial Guinea	12**	200			
Ethiopia ¹	12		Madagascar ¹	12**	200
			Malaysia ¹	12	200
Falkland Islands	3	150	Maldives ³	12**	up to 200
Fiji ^{2*}	12	200			
Finland ¹	4**	12	Malta ¹	12	25
France ¹	12	200	Mauritania ¹	70	200
French Antarctica	12		Mauritius ¹	12**	200
			Mexico ^{1*}	12	200
Gabon	12	200	Monaco ³	12	12
Gambia*	12	200	Montserrat	3	200
Germany (East) ^{1 11}	12**		Morocco	12	200
Germany (West) ^{1 10}	3	200	Mozambique	12	200
Ghana*	12	200			
Gibraltar	3	3	Namibia	12	200
Greece	6	6	Nauru	12	200

Netherlands	12	200	Sri Lanka	12**	200
Netherlands Antilles	12	12	Sudan*	12**	
New Zealand	12	200	Suriname	12	200
Nicaragua	200**	200	Sweden ^{1 11}	12**	200
Nigeria*	12**	200	Syria	35**	
Norway ¹	4	200	Taiwan	12	200
Oman ¹	12	200	Tanzania ^{1*}	50	50
Pakistan	12**	200	Thailand ¹	12	200
Panama	200	200	Togo*	30	200
Papua New Guinea ²	12	200	Tonga ⁷	12	200
Peru	200	200	Trinidad and Tobago ^{2*}	12	200
Philippines ^{3*}	12	200	Tunisia ^{1 9*}	12	12
Pitcairn	3	200	Turkey ¹	12 ^{7**}	12 ⁷
Poland ⁸	12**	12	Turks and Caicos Islands	3	200
Portugal ¹	12	200	Tuvalu	12	200
Qatar	3	to median lines	UAE		up to 73
Romania	12**	200	Abu Zabi	3	
St. Helena, Ascension and Tristan da Cunha	3	200	Ajman	3	
St. Kitts-Nevis	12	200	Dubayy	3	
St. Lucia*	12	200	Fujayrah	12	
St. Vincent and the Grenadines ²	12	200	Ra's al Khaymah	3	
Sao Tomé and Príncipe ²	12	200	Ash Shariqah	12	
Saudi Arabia ¹	12		Umm al Qaywayn	3	
Senegal ^{1*}	12	200	UK ¹	12	200
Seychelles	12**	200	Uruguay	200	200
Sierra Leone	200	200	USA	3	200
Singapore	3	3	USSR ¹	12**	200
Solomon Islands ²	12	200	Vanuatu ²	12	200
Somalia	200**	200	Venezuela ¹	12	200
South Africa	12	200	Vietnam ¹	12**	200
South Georgia and South Sandwich Islands	3	3	Western Samoa	12	200
Spain ¹	12	200	Yemen Arab Republic	12**	36
			Yemen People's Democratic Republic ¹	12**	200
			Yugoslavia ^{1*}	12	12
			Zaire	12	200

Limits of dependent territories have not been listed unless they differ from those of the metropolitan state.

- ¹ Employs straight baseline systems along all or a part of the coast.
- ² Claims all waters within the archipelago.
- ³ Claims waters within limits defined by geographical co-ordinates not related to distance from coastline.
- ⁴ Claims straight baseline system between points along the 18-metre depth line.
- ⁵ Claims all water south of 32°30'N. in Gulf of Sirte as internal waters.
- ⁶ Claims 3 miles in Korea Strait.
- ⁷ Claims 6 miles in Aegean Sea.
- ⁸ Fishery limit extends beyond 12 miles to limits to be agreed.
- ⁹ Fishery limit extends to 50-metre isobath off Gulf of Gabes.
- ¹⁰ Special claim extends limit to include deep water anchorage west of Helgoland.
- ¹¹ Reduced limits in some straits.

* Indicates a state which has ratified the U.N. Law of the Sea Convention 1982. The Convention does not come into force until one year after 60 instruments of ratification or accession have been deposited.

** Indicates a state which requires prior permission or notification for entry of warships into territorial sea. The United Kingdom government does not recognise this requirement.

Hydrographic Department. (*H.1221/87.*)

(*Annual Summary of Admiralty Notices to Mariners (in force on 1 January 1988)*, pp. 102-4)

In reply to a question about the breadth of the territorial sea of NATO member States, the Minister of State for Defence Procurement wrote:

The breadth of the territorial sea is for individual coastal states to determine in accordance with international law, which allows for a maximum limit of twelve nautical miles. There is no need for discussion of the question of member states' limits within NATO.

(HL Debs., vol. 494, col. 171: 1 March 1988; see also HL Debs., vol. 495, col. 905: 31 March 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We recognise a breadth of 12 nautical miles as the maximum limit of the territorial sea, and consider this applies equally to the Soviet Union as to other countries. (HL Debs., vol. 495, col. 285: 23 March 1988)

The Bermuda (Territorial Sea) Order in Council 1988 (Statutory Instrument 1988 No. 1838), made on 26 October 1988 and in force on 28

November 1988, provides for the extension of the boundaries of the Colony of Bermuda. An explanatory note accompanying the Order reads as follows:

This Order extends the boundaries of Bermuda, so as to include, as territorial sea, the sea within twelve nautical miles of the baselines, together with its seabed and subsoil, and makes other provisions in this connection. In particular, it defines the baseline from which the breadth of the territorial sea is measured as generally the low water line, except that, between points at $32^{\circ}15'2''\text{N}$ $64^{\circ}52'3''\text{W}$ and $32^{\circ}22'7''\text{N}$ $64^{\circ}39'7''\text{W}$ on the coast inshore of Hogfish Cut and Town Cut respectively, the baseline follows the seaward limit of the main reef as shown on Admiralty Chart 334 to the west and north of the main group of the islands of Bermuda. Where there is a break or passage in that reef, the baseline is a straight line joining the seaward entry points of that break or passage.

On 2 November 1988, the Foreign Ministers of the UK and France signed an Agreement relating to the Delimitation of the Territorial Sea in the Straits of Dover. At the same time the Foreign and Commonwealth Office issued a statement which read in part as follows

The Territorial Sea Act 1987 extended the territorial sea from 3 to 12 miles. (The French already had a 12 mile limit.) In the Straits of Dover where England and France are less than 24 miles apart, Britain established by Order in Council in 1987 the limit of the territorial sea as the line agreed in 1982 as the boundary of the continental shelf. At French suggestion, however, a formal Agreement was drafted to define the boundary of the territorial sea in the Straits of Dover using the appropriate part of the 1982 line.

(Text provided by the Foreign and Commonwealth Office)

Part Nine: I. B. 1. *Seas, waterways, ships—territorial sea—legal status—right of innocent passage*

(See Part Nine: I. B. 4., below)

Part Nine: I. B. 2. *Seas, waterways, ships—territorial sea—legal status—regime of merchant ships*

In reply to the question what specific arrangements currently exist for the recovery of spent nuclear fuel casks and containers from the Channel in the event of the sinking of a cargo ferry carrying such objects to or from UK ports, the Minister for Public Transport wrote in part:

Within United Kingdom territorial waters, the Secretary of State's statutory powers of intervention would, if necessary, be used to give directions to the owners of the vessel or to the salvors on the action to be taken to prevent pollution. If such directions proved inadequate, those powers could be used to allow direct action to be taken which could extend to taking control of the ship and recovering its cargo.

(HC Debs., vol. 135, Written Answers, col. 128: 14 June 1988)

Part Nine: I. B. 4. *Seas, waterways, ships—territorial sea—legal status—warships*

In reply to the question which interpretation of international law concerning the territorial sea is observed by NATO navies exercising together in northern waters, the Minister of State, Foreign and Commonwealth Office, wrote:

. . . we recognise a breadth of 12 nautical miles as the maximum limit for the territorial seas. Carrying out of exercises (such as weapons practice or manoeuvres) by the Royal Navy within foreign territorial seas, as opposed to exercising the right of innocent passage, would require the consent of the coastal state concerned.

(HL Debs., vol. 494, col. 557: 7 March 1988)

Part Nine: II. *Seas, waterways, ships—contiguous zone*

(See Part Nine: VII. A. 1. (item dealing with Article 17 of draft UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances), below)

Part Nine: III. *Seas, waterways, ships—internal waters, including ports*

(See Part Eight: II. A. (item of 26 January 1988), above, and Part Nine: XV. D. (item of 28 January 1988), below)

Part Nine: IV. *Seas, waterways, ships—straits*

On 2 November 1988, the Foreign Ministers of the UK and France signed an Agreement relating to the Delimitation of the Territorial Sea in the Straits of Dover. At the same time the following Joint Declaration was issued:

JOINT DECLARATION

BY

THE GOVERNMENT OF THE UNITED KINGDOM AND THE
GOVERNMENT OF THE FRENCH REPUBLIC

On the occasion of the signature of the Agreement relating to the Delimitation of the Territorial Sea in the Straits of Dover, the two Governments agreed on the following declaration:

The existence of a specific regime of navigation in straits is generally accepted in the current state of international law. The need for such a regime is particularly clear in straits, such as the Straits of Dover, used for international navigation and linking two parts of the high seas or economic zones in the absence of any other route of similar convenience with respect to navigation.

In consequence, the two Governments recognise rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Straits of Dover. It is understood that, in accordance with the principles governing this regime under the rules of international law, such passage will be exercised in a continuous and expeditious manner.

The two Governments will continue to co-operate closely, both bilaterally and through the International Maritime Organisation, in the interests of ensuring the safety of navigation in the Straits of Dover, as well as in the southern North Sea and the Channel. In particular, the traffic separation scheme in the Straits of Dover will not be affected by the entry into force of the Agreement.

With due regard to the interests of the coastal states the two Governments will also take, in accordance with international agreements in force and generally accepted rules and regulations, measures necessary in order to prevent, reduce and control pollution of the marine environment by vessels.

(Cm. 557)

In a press statement issued at the time of signature, the Foreign and Commonwealth Office stated in part:

Both sides considered it important to set out their common attitude to the important issue of passage through straits. The Joint Statement published with the Agreement will be of wide interest as it concerns one of the major straits in the world and sets out passage rights we would expect to be accorded in such straits elsewhere. It describes a regime of navigation which takes account of the transit passage regime contained in Part III of the UN Convention on the Law of the Sea 1982 which was based on British proposals.

(Text provided by the Foreign and Commonwealth Office)

Part Nine: VII. A. 1. *Seas, waterways, ships—the high seas—freedoms of the high seas—navigation*

(See also Part Fourteen: III. (item of 12 April 1988), below)

On 28 October 1987, a Deep Water Route, approved by the International Maritime Organization, was established west of the Outer Hebrides. The following Notice to Mariners was issued by the Hydrographer of the Navy:

Charts 2721, 2635

A Deep-water Route has been established between the Outer Hebrides and the off-lying Saint Kilda and Flannan Isles. The route, which lies within an extensive area which has been fully surveyed to modern standards, extends from a position 20 miles ESE of Saint Kilda to a position 30 miles WSW of Butt of Lewis. The route is 6 miles wide and has a least depth of 34 m. The route has been adopted by IMO, who recommend that laden tankers of over 10 000 grt should use this route, weather permitting, in preference to the more restricted waters of The Minches. The Deep-water Route and the area W of The Outer Hebrides, which has been fully surveyed to modern standards, are shown on the charts.

(Notice to Mariners 41/87)

On 15 July 1986, the UK and the USSR concluded an Agreement concerning the Prevention of Incidents at Sea beyond the Territorial Sea (UK TS No. 5 (1987), Cm. 57). In 1987, the Foreign and Commonwealth Office issued the following Notice to Mariners:

UNITED KINGDOM AND U.S.S.R.—MUTUAL SAFETY PROCEDURES
FOR MILITARY UNITS AND FORMATIONS OUTSIDE TERRITORIAL
SEAS AND IMPLICATIONS FOR NON-MILITARY SHIPS.

Former Notice 7/87 is cancelled. This is a repetition of the former notice.

(1) The Governments of the United Kingdom and the Union of Soviet Socialist Republics have concluded an agreement to ensure mutual safety of military ships and aircraft, both singly and in formation, when engaged in manoeuvres and exercises outside territorial seas.

(2) 'Military ships' includes both warships and auxiliary ships; 'military aircraft' includes all military manned lighter-than-air and heavier-than-air craft, excluding space craft.

(3) Nothing in the agreement shall be taken to imply non-observance of the International Regulations for the Prevention of Collisions at Sea, 1972. Ships subject to the agreement shall, when meeting or operating in the vicinity of each other, remain well clear and avoid manoeuvring in a manner which would hinder the evolutions of each other, whether singly or in formation.

(4) Ships and aircraft subject to the agreement shall not carry out simulated attacks by any means against ships, military or non-military, of the other nation. Ships shall not use searchlights to illuminate the navigation bridges of passing ships.

(5) Formations of ships subject to the agreement shall not conduct manoeuvres through areas of heavy traffic where internationally recognised traffic separation schemes are in effect.

(6) When ships subject to the agreement manoeuvre in sight of one another or are acting in support of submerged submarines, such signals (flag, sound and light) as are prescribed by the International Regulations for the Prevention of Collisions at Sea, 1972, the International Code of Signals and the Table of Special Signals set out in the Annex to this Notice shall be used. At night, in reduced visibility or any other circumstances when signal flags are not distinct, flashing light signals or VHF Radio Channel 16 should be used.

(7) Each nation party to the agreement shall provide, through established radio navigational warnings, normally not less than three to five days in advance, notification of actions beyond the territorial seas which represent a danger to navigation or to aircraft in flight.

Foreign Office. (*H. 1216/87.*)

(*Annual Summary of Admiralty Notices to Mariners (In force on 1 January 1988)*, p.76)

In reply to a question on the subject of the Gulf area, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We remain committed to the principle of freedom of navigation, and will continue to do everything possible to assist British merchant shipping in the region.

(*HC Debs.*, vol. 126, Written Answers, col. 634: 3 February 1988; see also *HC Debs.*, vol. 130, Written Answers, col. 515: 30 March 1988; *ibid.*, vol. 132, Written Answers, col. 231: 28 April 1988 and *ibid.*, col. 470: 4 May 1988; *HL Debs.*, vol. 499, col. 1587: 22 July 1988)

In the course of replying to a question on Iran/UK relations, the Minister of State, Foreign and Commonwealth Office, wrote:

. . . Iran continues to make unlawful attacks on unarmed merchant vessels, including British ships in the Gulf.

(HC Debs., vol. 136, Written Answers, col. 189: 28 June 1988)

In the course of a speech in the UN Security Council on 15 July 1988, the UK representative, Mr J. Birch, stated:

Despite Security Council Resolution 598, fighting has continued between Iran and Iraq, with frequent attacks, contrary to international law, on merchant shipping in international waters.

(S/PV. 2819, p.6)

In reply to a question asked at a press conference given by the Foreign and Commonwealth Office on 25 November 1988, a spokesman made the following statement:

He confirmed that on 20 November a Guatemalan naval vessel fired shots near HMS Fawn, a Royal Naval hydrographic survey vessel, carrying out survey work in the Gulf of Honduras in waters which Her Majesty's Government consider to be high seas. No injuries or damage were caused. A protest had been made to the Guatemalan Government on 24 November. The Royal Navy's survey work in international waters in the area would, of course, continue.

(Text provided by the Foreign and Commonwealth Office; see also HC Debs., vol. 142, Written Answers, cols. 333-4: 1 December 1988)

In reply to a question on the same subject, the Parliamentary Under-Secretary of State for the Armed Forces wrote:

The RN ship involved was the hydrographic vessel HMS Fawn. The incident took place not in Guatemalan territorial waters but while Fawn was conducting a hydrographic survey in international waters to the north of a median line between Belize and Guatemala. Shots were fired in the vicinity of HMS Fawn: it is not known whether these were aimed at her or were intended simply as a warning. A diplomatic protest has been made to the Guatemalan Government. The survey will of course continue.

(Ibid., col. 353)

Article 17 of the draft United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, discussed at a conference in Vienna in November and December 1988, read as follows:

ARTICLE 17

Illicit Traffic by Sea

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or

not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, *inter alia*:

- (a) Board the vessel;
- (b) Search the vessel;
- (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

(E/CONF. 82/13)

The following statement was made by the Netherlands delegate to the conference:

In respect of article 17, the delegation of the Kingdom of the Netherlands wishes to put on record its understanding of that Article.

We understand the reference (in para. 3) to 'a vessel exercising freedom of navigation' to mean a vessel navigating beyond the external limits of the territorial sea.

The safeguard-clause contained in para. 11 of the Article aims in our view at safeguarding the rights and obligations of Coastal States within the contiguous zone.

To the extent that vessels navigating in the contiguous zone act in infringement of the Coastal State's customs and other regulations, the Coastal State is entitled to exercise, in conformity with the relevant rules of the international law of the sea, jurisdiction to prevent and/or punish such infringement.

The UK delegate, Mr C.A. Whomersley, then made the following statement:

My Delegation would wish to associate ourselves with the views expressed by the distinguished representative of the Netherlands. In addition we would draw attention to the very limited obligation in paragraph 11 of Article 17 and to the fact that it only refers to the need to take 'due account' of the coastal State's interests.

(Texts provided by the Foreign and Commonwealth Office)

Part Nine: VII. C. *Seas, waterways, ships—the high seas—hot pursuit*

In reply to a question on the subject of alleged Irish illegal salmon fishing within the Scottish sector of the UK fishery zone, the Minister of State, Scottish Office, Lord Sanderson, stated in part:

Under international agreements an Irish vessel could be pursued from within our waters if it is caught within our 200-mile economic zone. However, we have no record of that 'hot pursuit' process having occurred so far.

(HL Debs., vol. 497, col. 322: 18 May 1988)

Part Nine: VII. D. *Seas, waterways ships—the high seas—visit and search*

(See Part Nine: VII. H. and Part Fourteen: III. (Written Answer of 15 February and item of 12 April 1988), below)

Part Nine: VII. H. *Seas, waterways, ships—the high seas—jurisdiction over ships*

In the case of *United States v. Biermann* in the Federal District Court for California, the judgment of Legge, District Judge, began as follows:

For purposes of this motion, the relevant facts are uncontested in the record.

The Myth of Ecurie ('Myth') is a sailing vessel registered in the United Kingdom and flying the flag of the United Kingdom. The boat's home port in the United Kingdom was displayed on the stern. One of the defendants is a United Kingdom citizen, one is a Bermuda citizen, one is a German citizen, and one is a United States citizen.

Defendants sailed the Myth from Hong Kong, across the Pacific to the west

coast of the United States. On June 15, 1987 a United States Coast Guard cutter encountered the Myth about thirty-five nautical miles southwest of Point Reyes, California. The Myth was headed for San Francisco. Upon the approach of the cutter, the Myth's master and the Coast Guard engaged in radio conversation. The Coast Guard requested permission to conduct a consensual boarding of the Myth. The request was denied. The master of the Myth asserted that the Coast Guard had no jurisdiction, since the Myth was a boat of United Kingdom registry sailing in international waters.

The Coast Guard made certain observations about the Myth. Then apparently acting in compliance with procedures established in a 1981 agreement between the United States and the United Kingdom, the captain of the cutter requested from the government of the United Kingdom a statement that the United Kingdom did not object to the Coast Guard boarding the Myth. The United Kingdom replied by teletype that it would not object to the boarding, search and seizure of the Myth by the Coast Guard under the terms of that agreement.

On June 16, the Coast Guard boarded the Myth. At the time of the boarding, the Myth was located over 100 miles west of the California coast. The Coast Guard boarding officer smelled marijuana when he came aboard the Myth. The master of the Myth and boarding officer went below to obtain any weapons. The boarding officer there saw numerous bails [*sic*] of material in plain view and noticed the heavy smell of marijuana. When the boarding officer asked the master what was in the bails, the master replied that it was marijuana. The Myth and defendants were then brought to the Coast Guard station on Yerba Buena Island in San Francisco Bay and were placed under arrest. The marijuana aboard the Myth totaled over 7,000 pounds, stored in 236 bails.

(678 Fed. Supp. 1438, 1439-40 (1988))

Later in his judgment, the Judge set out the terms of the above teletype message in material part as follows:

1. HMG HAS VERIFIED REGISTRY OF SUBJ[ECT] VESSEL AND HAS AUTHORIZED USG TO BOARD, SEARCH AND SEIZE, IF EVIDENCE WARRENTS [SIC], UNDER U.S. LAW. HMG HAS INDICATED THAT THE CONDITIONS AND TERMS CONTAINED IN 13 NOV 81 US/UK AGREEMENT WILL BE USED IN THIS CASE.
2. IN VIEW OF THE ABOVE, COMDT HAS NO OBJECTION TO TAKING ACTION AGAINST SUBJ[ECT] VESSEL UNDER THE TERMS OF THE US/UK AGREEMENT.

(*Ibid.*, p. 1442, footnote 2)

[*Editorial note*: The US/UK Agreement referred to is the Exchange of Notes concerning Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States, concluded on 13 November 1981 (UKTS No. 8 (1982); Cmnd. 8470; see also UKMIL 1981, pp. 471-3). As the Judge pointed out elsewhere in his judgment, the geographical scope of this Agreement does not include the Pacific Ocean. It is unlikely that the teletype message reproduced in the judgment came directly from the UK authorities. It is probable that it came from US authorities after consultation with the UK authorities.]

Part Nine: VIII. Seas, waterways, ships—continental shelf

(See also Part Nine: IX. (item of 26 July 1988), below)

In reply to the question what are the requirements of international law for the removal of oil drilling platforms at sea, the Government Minister wrote:

The Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, which were approved by the Maritime Safety Committee of the International Maritime Organisation at its Fifty-fifth Session in April 1988, contain detailed guidance and international standards, based on the underlying legal principles, which member governments are being invited to take into account when making decisions about abandonment.

(HL Debs., vol. 496, col. 1118: 10 May 1988)

On 2 November 1988, the Foreign Ministers of the UK and France signed an Agreement on the Delimitation of the Territorial Sea in the Straits of Dover. Article 2 of the Agreement reads in part:

Points I and VI as defined above shall be the new final points of the boundaries delimiting the parts of the continental shelf appertaining to the United Kingdom and to France in the area east of 30 minutes west of the Greenwich Meridian.

(Cm. 557)

On 7 November 1988, the Foreign Ministers of the UK and the Irish Republic signed a bilateral Agreement on the Delimitation of the Continental Shelf. The following statement was issued at the same time by the Foreign and Commonwealth Office:

BACKGROUND

The Agreement lays down agreed boundaries in the Irish and Celtic Seas, as well as to the west of Scotland, taking full account of the current rules of international law on maritime boundaries. It will settle the outstanding dispute about seabed boundaries, thereby opening up new areas for prospecting by the oil industry and removing any need for arbitration. It represents a significant measure of Anglo-Irish cooperation in that the two sides have reached agreement on the definition of continental shelf boundaries approximately 502 and 634 miles long respectively.

With the enactment of the Continental Shelf Act 1964 and ratification by the UK of the Continental Shelf Convention 1958, the UK proposed bilateral discussions with all neighbouring states concerning the boundaries of the Continental Shelf. Agreements were concluded in the 1960s and 1970s with Norway, Denmark, the FRG and the Netherlands. Boundaries with France were determined by Arbitration in 1977/78 and by an Agreement in 1982.

Negotiations throughout this period with the Irish were however unsuccessful and both sides decided in 1980 to enter into an ad hoc arbitration. In examining the terms for arbitration, it became clear that narrowing the scope of matters at issue would be likely to lead to a speedier conclusion and reduce legal costs. The Agreement which emerged from these discussions removes the need for arbitration altogether by settling outstanding differences over seabed boundaries.

Claims made in 1985 by Denmark and Iceland, including areas off the north-west coast of Ireland appertaining to the UK and the Irish Republic, were rejected by both Governments. These objections still stand.

(Text provided by the Foreign and Commonwealth Office)

The Secretary of State for Foreign and Commonwealth Affairs wrote in answer to a question on the subject of the above Agreement:

I signed an agreement with the Republic of Ireland on the delimitation of the continental shelf in Dublin on 7 November . . .

The agreement lays down boundaries of the continental shelf in the Irish and Celtic seas and the south-west approaches as well as to the west of Scotland, taking full account of the current rules of international law. It removes altogether the need for the arbitration previously announced.

The agreement will bring advantages to both sides, in particular in opening up new areas for the off-shore industries where, in the absence of such an agreement in the past, exploitation was prevented.

I regard this agreement as a very positive outcome of lengthy negotiations, and an equitable solution to a dispute which began nearly 25 years ago.

(HC Debs., vol. 140, Written Answers, col. 157: 8 November 1988)

In addition to containing Articles describing the location of the lines of boundary, the Agreement contains the following provisions:

ARTICLE 3

If any oil, gas or condensate field extends across Line A or Line B and the part of such field which is situated on one side of the line is exploitable, wholly or in part, from the other side of the line, the two Governments shall make determined efforts to reach agreement as to the exploitation of such field.

ARTICLE 4

Nothing in this Agreement affects the position of either Government concerning the location of the outer edge of its continental margin.

In reply to the question

What are the international rules under which the cutting down and/or removal of the installation, Piper Alpha, in the North Sea will be permitted; from whom will advice and opinions be sought on matters of short-term and of long-term safety, in view of the reported presence on the platform of several tons of a hazardous chemical; and whether those consulted will include the EEC Commission, the International Council for the Protection of the Sea, NATO, the Norwegian and other Governments of states bordering on the North Sea,

the Parliamentary Under-Secretary of State, Department of Energy, wrote:

My noble friend Lord Davidson set out in some detail the principles of international law relating to platform abandonment in the Answer he gave to the noble Lord's Question on 23rd February 1987 (*Hansard* Vol. 485, cols. 83-84). Since

then the International Maritime Organisation has published *Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone* (MSC Circular No. 490 dated 4th May 1988) and these have been endorsed by the Oslo Commission and the parties to the London Dumping Convention.

An abandonment programme for the Piper Alpha installation has been called for and received by the Secretary of State for Energy under Section 4 of the Petroleum Act 1987. This has not yet been approved. My department is in close touch with the Department of Transport and the Department of Agriculture and Fisheries for Scotland over the navigational safety and marine environmental implications of the programme. The Nature Conservancy Council has also volunteered advice. My right honourable friend the Minister of State will be meeting the Scottish Fishermen's Federation on 2nd November. We do not propose to consult any of the bodies listed by the noble Lord in his Question, since abandonment is a matter which falls wholly within the competence of the coastal state, subject to the requirements of international law.

(HL Debs., vol. 501, cols. 466–7: 3 November 1988; see also UKMIL 1987, pp. 605–6)

In moving the second reading in the House of Commons of the Petroleum Royalties (Relief) and Continental Shelf Bill, the Minister of State, Department of Energy, Mr Peter Morrison, stated:

The Bill's second purpose . . . is to enable the United Kingdom to implement the agreement negotiated recently with the Irish Republic on the delimitation of the continental shelf. That is dealt with in clause 3. The agreement resolves an issue which has been outstanding for 25 years. Agreeing boundaries will open up new opportunities for the oil and supply industries if exploration in the areas should prove successful. I hope that all hon. Members will agree that that represents an important step forward. . . .

I want to explain a little more about the agreement. At present, we have powers to designate areas for offshore activity on our continental shelf, but we do not have powers to de-designate, and those are what the Bill is taking. When I was first told that, I must admit that it did not mean very much to me, and I suspect that it does not mean all that much to my hon. Friends or to Opposition Members. Let me try to make it a little clearer. There are areas off the west coast of Scotland which in the past have been claimed by both sides. After considerable negotiation, it has been agreed that the Republic of Ireland should give up some of its claim and so should we. However, we cannot give effect to that, because we do not have the necessary powers. That is the purpose of this small clause: it covers that agreement and that agreement alone. I assure the House that it would not permit the Government to do anything similar elsewhere. As the House will see, the Bill refers specifically to the agreement signed in Dublin on 7 November—no more and no less.

Some hon. Members may believe that the territory of Northern Ireland is being given up as part of the agreement. I give a categorical assurance that that is not so. The line in the north-west starts at latitude 55°28' north and longitude 6°45' west. That is well to the west of any conceivable boundary between the continental shelf of Northern Ireland and that of the Irish Republic.

(HC Debs., vol. 142, col. 737: 29 November 1988)

Part Nine: IX. Seas, waterways, ships—exclusive fishery zone

(See also Part Nine: I.A., above and Part Nine: X., below)

The Foreign and Commonwealth Office and the Ministry of Defence presented a memorandum, dated 17 December 1986, to the Defence Committee of the House of Commons, investigating defence in the South Atlantic. In this document, the following answers were given:

(iv) *What indications have been received from other governments as to their policy towards the Interim Conservation and Management Zone?*

1. When the Government announced the establishment of the Falkland Islands Interim Conservation and Management Zone on 29 October 1986 interested governments were also informed directly. The indications are that governments will avoid taking a position on the Zone. There are no signs that it has affected attitudes towards the sovereignty dispute.

2. Applications for fishing licences have been received from all the fleets which have been fishing in the area in the last few years, save the East Germans, the Russians and the Bulgarians. The Soviet Union and Bulgaria have signed fishing agreements with Argentina. The Soviet Government have told us that their fleet will not apply for licences and hence will not fish in the FICZ. In addition to the applications from those with a presence in the fishery there have also been applications from a number of other countries.

3. In their statement of 30 October on the declaration, the US State Department spokesman commented that 'it is legitimate for a state to claim a fishing zone of up to 200 miles off the coast of its territory'.

4. Only Argentina has challenged our right to declare maritime jurisdiction around the Falkland Islands.

(v) *What are to be the requirements of the regime, particularly in respect of seasons, species and net size; and what will be the licensing arrangements and fees?*

1. Section 8 of the Falkland Islands Fisheries (Conservation and Management) Ordinance 1986 gives the Director of Fisheries the power to limit the number of vessels engaged in fishing and related activities. In view of the pressure on fish stocks in the FICZ the Falkland Islands Government will issue four separate licences: two covering the *Illex* and *Loligo* squid fisheries from February to June and two regulating the *Loligo* and finfish grounds during the second half of the year.

2. The licence fee will vary according to the species being targeted and the size and type of vessel. The jiggers will pay a higher fee which reflects their intensive and more profitable fishing method. The fee details for jiggers and trawlers are being finalised. Once they have been approved by the Governor of the Falkland Islands they will be published. There are, as yet, no restrictions on mesh size. The fees for the first season have been set at the comparatively modest level of approximately 5 per cent of the estimated value of the likely catch.

...

(ix) *What legal powers are available to deal with infringements; before what court cases will be heard; what proof of an infringement is expected to suffice, for*

example, whether it will be necessary to require a master to fix his position once having been boarded, and whether aerial photographs, with evidence of time and position, are expected to suffice

1. The legal powers available to the Falkland Islands Government for enforcement of the Falkland Islands Interim Conservation and Management Zone are contained in the Fisheries (Conservation and Management) Ordinance 1986 which was published on 12 November 1986. The relevant provisions of the Ordinance and all of the associated Regulations came into force on 5 December.

2. The powers of Fisheries Protection Officers are set out in Section 10 of the Ordinance. Paragraph 10(1)(j) authorises an officer, where he believes an offence has been committed, to bring the master and/or crew of the boat before either the Summary or the Magistrate's Court, the jurisdiction of which are provided for in Section 16. The Summary or Magistrate's Court can, for example, impose fines and may award to the Crown costs and expenses incurred in relation to the prosecution. The Summary Court consists of three lay Justices of the Peace; the Magistrate's Court is presided over by a stipendiary Resident Magistrate. It would be normal for cases brought under the Fisheries Ordinance to be heard by the Magistrate's Court.

3. Under Section 5 the fishing vessels have to notify a Fisheries Protection Officer prior to entering or leaving the FICZ. Evidence of an infringement will vary. At sea, when a fishing vessel has been boarded the protection vessel will fix its position. In other instances aerial photographs taken by the fisheries protection aircraft, supported where practicable by statements from the pilot, on the time and the position of the vessel could be used by the prosecuting authorities.

(*Parliamentary Papers*, 1986-7, HC, Paper 408, pp. 42-3)

Appendix B to the above memorandum contained the texts of the following documents:

ARGENTINE/SOVIET FISHERIES AGREEMENT STATEMENT ISSUED BY FOREIGN AND COMMONWEALTH OFFICE ON 13 AUGUST 1986

'On 29 July the Soviet and Argentine Press reported that the Soviet Union and Argentina had signed a bilateral fisheries agreement in Buenos Aires on 28 July. We do not yet know the precise scope of the Agreement. HM Embassy in Moscow have asked the Soviet Government for a copy of the text. But HMG wish to make it clear that if this agreement purports to regulate fishing activity in the waters surrounding the Falklands Islands, it would have no basis in international law. British sovereignty over, and administration of, the Falklands confers on the British Government and the Falklands authorities the right to exercise fisheries jurisdiction over these waters. This right remains unaffected by the Soviet/Argentine fisheries agreement or any other bilateral fisheries agreement.'

In reply to a question Spokesman confirmed that territorial waters around the Falkland Islands extended for three miles. He added that HMG retained the right to declare a unilateral exclusive fisheries limit but its aim was the establishment of an effective conservation and management regime in the South West Atlantic. HMG believed that a multilaterally-based arrangement offered the best prospect. In response to further questions. Spokesman said that discussions had taken place

through the FAO and that Argentina had agreed to participate in the FAO study. This study was expected to be ready next month for circulating to fishing nations for their comments.

ARGENTINE/SOVIET FISHERIES AGREEMENT

Following is text of note delivered to Russian Ministry of Foreign Affairs on 8 October 1986.

‘ . . . Has the honour to recall that on 14 August the Embassy conveyed to the Soviet Ministry of Foreign Affairs a copy of a statement issued by the Foreign and Commonwealth Office on 13 August concerning reports in the press that the Soviet Union and the Republic of Argentina had signed a fisheries agreement in Buenos Aires on 28 July. The Soviet Ministry of Foreign Affairs was asked to furnish a copy of the text of the Agreement, a request repeated by the Minister of State at the Foreign and Commonwealth Office, Lady Young, on 14 August when the Soviet Deputy Foreign Minister Mr Adamishin called on her. On 26 August His Excellency Mr Zamyatin, Ambassador of the Soviet Union in London, wrote to Lady Young explaining that the agreement fully corresponds to international law but that the Soviet Union could not provide a copy of the agreement without the consent of the other party.

For the reasons explained in the FCO statement of 13 August, the agreement continues to give rise to concern. According to an official Argentine text of the agreement obtained by the Swiss Embassy in Buenos Aires at the request of the British Interests Section the agreement relates to the South West Atlantic, refers to Argentina’s “Exclusive Economic Zone” and provides that areas may be defined from time to time for particular purposes connected with fishing. In his letter of 22 September, circulated as a document of the 41st General Assembly, Sir Geoffrey Howe pointed out that on the Argentine interpretation the agreement purports to extend to waters around the Falkland Islands. Indeed, in a report in *The Times* of 26 September from Buenos Aires, the Argentine Under-Secretary for Fisheries, Sr Luis Jaimes, is reported as saying that the agreement recognises the Argentine claim to sovereignty “in the zone”.

In the light of these factors, Her Majesty’s Government wish to make clear that as the sovereign administering authority they have the exclusive right under international law to create zones of maritime jurisdiction extending to a maximum of 200 miles from the Falkland Islands as well as to enter into agreements about fishing in any such zones. Her Majesty’s Government reserves its position in all respects in regard to the agreement of 28 July 1986.’

A note in similar terms is being conveyed to the Government of the Republic of Argentina by the Swiss Government on behalf of Her Majesty’s Government.

ARGENTINE/BULGARIAN FISHERIES AGREEMENT

Following is text of note delivered to Bulgarian Ministry of Foreign Affairs in October 1986.

‘ . . . Has the honour to recall that, when the Embassy conveyed on 18 August to the Bulgarian Ministry of Foreign Affairs a copy of a statement issued by the Foreign and Commonwealth Office on 13 August concerning reports in the press that the Soviet Union and the Republic of Argentina had signed a fisheries agree-

ment in Buenos Aires on 28 July, the Ministry of Foreign Affairs confirmed that a fisheries agreement between Bulgaria and Argentina was signed on 29 July. The Bulgarian Ministry of Foreign Affairs was asked to furnish a copy of the text of the agreement.

For the same reasons as those explained in the FCO statement of 13 August, the Bulgarian/Argentine agreement gives rise to concern. According to an official Argentine text of the agreement made available to the British Interests Section in Buenos Aires the agreement relates to the South West Atlantic, refers to Argentina's "Exclusive Economic Zone" and provides that areas may be defined from time to time for particular purposes connected with fishing. In his letter of 22 September, circulated as a document of the 41st General Assembly, Sir Geoffrey Howe pointed out that on the Argentine interpretation the Soviet/Argentine agreement purports to extend to waters around the Falkland Islands. Indeed, in a report in *The Times* of 26 September from Buenos Aires, the Argentine Under-Secretary for Fisheries, Sr Luis Jaimes is reported as saying that the Soviet/Argentine agreement recognises the Argentine claim to sovereignty "in the zone". HMG consider that the same considerations apply to the Bulgarian/Argentine agreement.

In the light of these factors, Her Majesty's Government wish to make clear that as the sovereign administering authority they have the exclusive right under international law to create zones of maritime jurisdiction extending to a maximum of 200 miles from the Falkland Islands as well as to enter into agreements about fishing in any such zones. Her Majesty's Government reserves its position in all respects in regard to the agreement of 29 July 1986.'

ARGENTINE/SOVIET FISHERIES AGREEMENT

Memorandum delivered to the Argentine Ministry of Foreign Affairs by the Swiss Embassy in Buenos Aires on 8 October 1986.

'The Government of the United Kingdom wish to refer to the signature by Argentina of a fisheries agreement with the Soviet Union on 28 July 1986.

The text indicates that the provisions apply to the Argentine "Economic Exclusive Zone". In this connection, the Government of the United Kingdom wish to make clear once again that they have the exclusive right under international law to exercise maritime jurisdiction and to establish maritime zones in respect of the Falkland Islands, South Georgia and the South Sandwich Islands, as well as to enter into agreements in respect of maritime activities in the areas in question. The Government of the United Kingdom must in these circumstances reserve their position in all respects in regard to this fisheries agreement.

The Government of the UK must at the same time reject the statement made by the Government of Argentina on 5 October 1984 about the final act of the third UN conference on the Law of the Sea, insofar as the statement purports to deny British sovereignty over, and maritime jurisdiction and rights in respect of, the Falkland Islands, South Georgia and the South Sandwich Islands. The Government of the UK have no doubt as to their sovereignty over, and maritime jurisdiction and rights in respect of, the Falkland Islands, South Georgia and the South Sandwich Islands.'

(Ibid., pp. 45-6)

On 21 January 1987, the Parliamentary Under-Secretary of State,

Foreign and Commonwealth Office, Mr Timothy Eggar, and the Head of the Falkland Islands Department, Foreign and Commonwealth Office, Mr A.J. Beamish, gave evidence to the Defence Committee. The following questions and answers, *inter alia*, were recorded:

116. Minister, on the 29th October 1986 at *Hansard*, column 324, the Secretary of State said, 'At the same time we are declaring entitlement of the Falklands under international law to a fisheries limit at 200—I presume nautical miles—'subject to delimitation with Argentina. We are also confirming our rights to jurisdiction over the continental shelf to the limits prescribed by the rules of international law.' Could you elaborate on that statement?

(*Mr Eggar*) The legal position is that any coastal state has the right to declare a fisheries limit up to a maximum of 200 miles, and that was basically what that statement was reinforcing.

117. In what other instances does the United Kingdom claim an exclusive economic zone of 200 nautical miles?

(*Mr Eggar*) This particular zone is not an exclusive economic zone as such.

120. Would you accept that while—I am not sure the Argentines wholly agree with this—the Argentines do not place a lot of weight on the strategic importance of the Falklands they have always placed a great deal of emphasis on their entitlement to territorial seas adjacent?

(*Mr Eggar*) They have obviously claimed the Islands and, therefore, by implication the seas around.

121. I am going a bit further than that, Minister. Is it not the case that Argentine writers as early as 1916 were arguing that they should assert fishing rights in all the waters overlying the Argentine continental shelf and its epicontinental sea?

(*Mr Beamish*) What I do know is that in 1966 the Argentine Government proclaimed an exclusive economic zone which extended out 200 miles from the coast of Argentina, 200 miles out from the Falklands, 200 miles out from South Georgia and the South Sandwich Islands and 200 miles out from the Antarctic claim on Antarctica.

122. So that what I am trying to establish is that your Office has been aware of Argentine attention to these matters and making at that time very elaborate claims to exclusive economic zones which have been well ahead of our attention to such matters.

(*Mr Beamish*) I think it is true to say the South American countries were among the first, if not the first, to develop and promulgate the concept of the 200 mile zone which was opposed at the time of the 1960s and early 1970s by other nations including Britain on the ground that it was a hindrance to freedom of navigation; but as you know, international law has moved on and the 200 mile zone is now a well recognised concept. In 1977, I think it was, in co-operation with our Community partners, the United Kingdom went out 200 miles for fisheries purposes in our own waters.

123. Is it not the case also in terms of appearance of support for international measures the Argentines have signed the Third United Nations Convention and we have not?

(*Mr Beamish*) That is the case.

124. So in terms of the other nations looking favourably on the support for

international law in terms of the sea, they might be predisposed to support the Argentine claim rather than our own?

(*Mr Beamish*) I do not know that that necessarily follows. Before the third Law of the Sea Convention was signed the notion of a 200 mile limit had been accepted quite widely and confirmed in decisions in the International Court of Justice. I think that there has been no protest other than from Argentina about our going out to 200 miles. The right we have to go out derives from our sovereignty, which has been, with the exception of the interval in 1982, continuously exercised for a very long time. Only if a country has a view about sovereignty would they necessarily feel disposed to contest what we have done on legal grounds.

125. On the conservation zone, does the configuration of it take consideration of the decision of the International Court in the *Malta v. Libya* case of 1985?

(*Mr Beamish*) It does.

126. And, therefore, there is a tacit acceptance that a median line between the Falkland Islands and Argentina would move much closer to the Falkland Islands than the median line drawn on the maps that have been placed before us?

(*Mr Beamish*) I do not know. There is not supposed to be a median line on your map.

127. That may be being unfair, but the median line that would normally be drawn. If you take consideration of the *Malta v. Libya* judgment, the division of the continental shelf between ourselves and the Argentines would move much closer to the Falkland Islands?

(*Mr Beamish*) That is correct. If I can make one observation there, when the Secretary of State made his announcement on the 29th he did say that the limit that was established would be subject to a boundary on the West with Argentina.

128. Yes, but he did also say that the 200 mile zone within which the fisheries conservation is being established does not depend on the Law of the Sea Convention. He is really relying on international law and, therefore, we are back to the *Malta v. Libya* judgment, are we not?

(*Mr Beamish*) Yes, quite right.

(*Ibid.*, pp. 56–8)

On 6 February 1987, the Foreign and Commonwealth Office presented a further report to the Defence Committee in which it replied to questions put to it by the Committee. Among the questions and answers were the following:

(iii) '*In what other instances the UK claims an EEZ or a fishing limit of 200nm.*'

3. In no case has the United Kingdom established an Exclusive Economic Zone of 200nm for a Dependent Territory. Apart from the United Kingdom, Fisheries Zones of 200nm have been established around the following Dependent Territories: Anguilla, Bermuda, Cayman Islands, Montserrat, Pitcairn, St Helena and dependencies, Turks and Caicos Islands and the British Virgin Islands.

(iv) (a) '*How many licences have now been taken up by each of the countries named in answer to Q134?*'

5. The United Kingdom, France, Spain, Holland, the Federal Republic of Germany, Greece, Taiwan, Japan, Korea, Poland and Italy were specified in the answer. The details are set out in the following table.

FICZ LICENCES: 1 February to 30 June 1987

Country	<i>Squid Illex</i> Fishery	North and South	<i>Squid Loligo</i> Fishery	Totals	
	North		South	Vessels	Licences
Japan	58	7	6	71	78
Taiwan	30			30	30
Korea	25			25	25
Poland	14	14	12	40	54
Spain	1	2	33	36	38
Chile			2	2	2
Italy		4	2	6	10
Greece			1	1	1
France		1		1	2
UK			3	3	3
	<hr/> 128	<hr/> 28	<hr/> 59	<hr/> 215	<hr/> 243

Total number of licences in North: 156 (ie 128 + 28).

Total number of licences in South: 87 (ie 59 + 28).

6. Vessels wishing to fish in more than one area are issued with separate licences for each (ie North and South) but only pay one fee (at the higher rate of the two). Offers of licences made to Dutch, West German and Portuguese vessels, in response to applications, were not taken up.

(Ibid., p. 64)

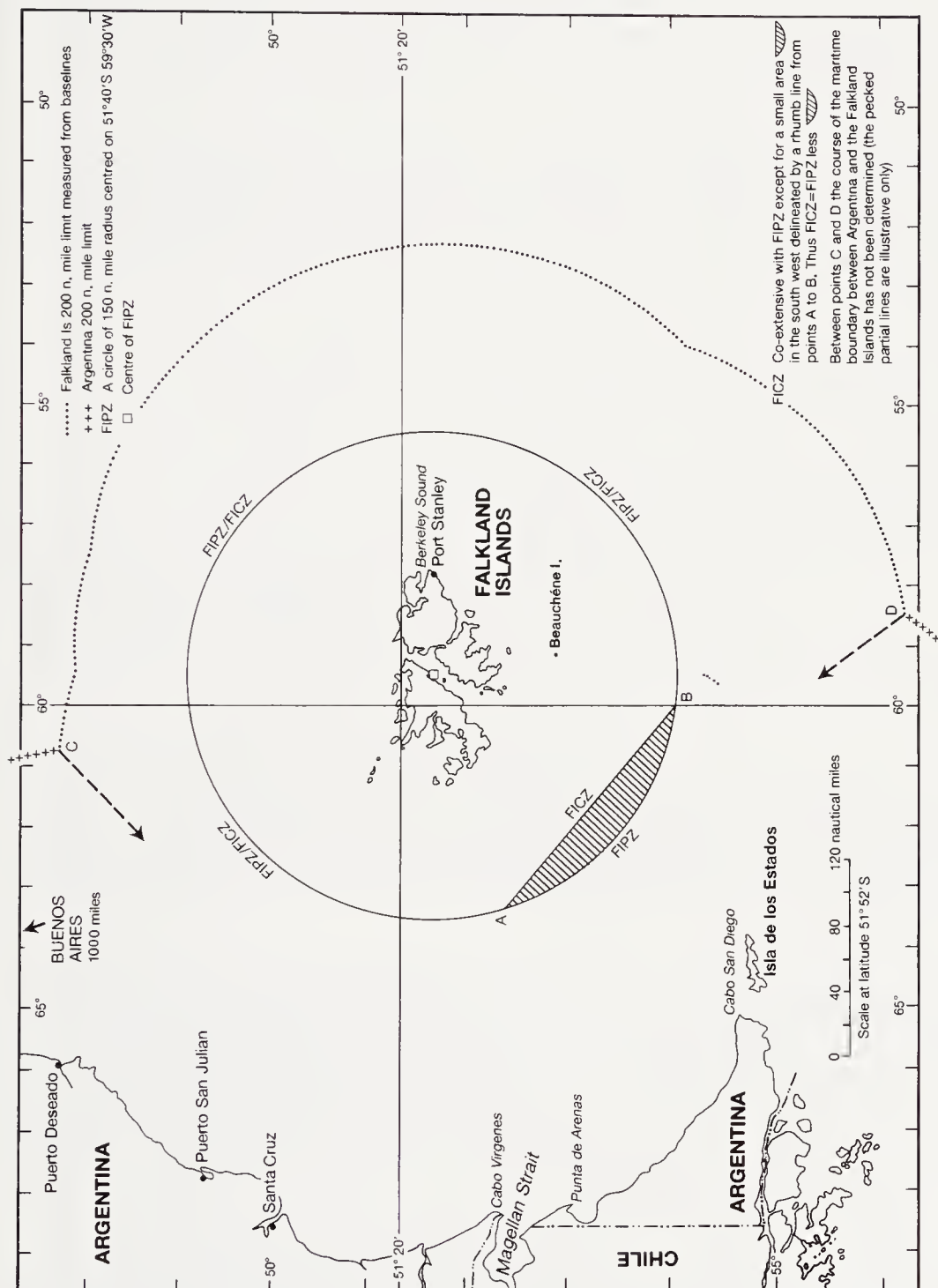
The Ministry of Defence, in consultation with the Foreign and Commonwealth Office, replied in February 1987 to questions put to it by the Defence Committee. Among the questions and answers were the following:

Q7. *What is HMG's policy towards the right of innocent passage as applied to Argentine ships within the FIPZ (Q327 and 328)?*

The 150 nautical mile Falkland Islands Protection Zone (FIPZ) was established around the Falklands on 22 July 1982 solely in order to avoid the risk of misunderstandings which might lead to a resumption of military confrontation in the South Atlantic. It exists to allow British Forces to take all necessary measures to defend the Islands in accordance with the inherent right of self defence recognised in Article 51 of the United Nations Charter.

The Argentine Government was, therefore, informed on 21 July 1982 that any Argentine warship or Argentine military aircraft entering the protection zone may be deemed to demonstrate hostile intent towards British forces or territory and may be dealt with accordingly. All Argentine civil aircraft and shipping were requested not to enter the protection zone without the prior agreement of the British Government. The Argentine Government has been reminded of these warnings on a number of occasions.

The necessity for the protection zone is kept under continuous review. A formal declaration of the cessation of hostilities would not, by itself, be sufficient justification to lift the zone. The United Kingdom would look to Argentina to demonstrate, in a convincing manner and by actions as well as words, that it renounces



the future use of force, including actions calculated to raise tensions, and is prepared to work for a renewal of normal relations.

The zone is not a claim to territorial waters (except for the 3 nautical miles Falklands territorial waters) and ships and aircraft from countries other than Argentina transit the zone freely.

(Ibid., p. 95)

In reply to the question whether Her Majesty's Government's acquiescence to the EC Morocco fishing agreement of 1987 had implications for its policy towards Morocco's claim to waters in dispute between Morocco and the Polisario, the Minister of State, Foreign and Commonwealth Office, wrote:

The European Community/Morocco fisheries agreement has no implications for our existing policy towards Morocco's claim to the disputed waters.

(HC Debs., vol. 131, Written Answers, col. 33: 12 April 1988)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Vessels from the Republic of Korea were arrested on four occasions in April and May 1988 for fishing illegally in the Falkland Islands interim conservation and management zone and were fined a total of £260,000 by magistrates in Port Stanley. A Polish vessel received an administrative penalty of £1,000 for unlicensed transshipment of fish.

(HC Debs., vol. 136, Written Answers, col. 255: 29 June 1988)

Following the Written Answer dated 19 July 1988 concerning exclusive economic zones of dependent territories (Part Nine: X., below), the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, wrote to the Member of Parliament who had asked the question, Mr J. Sayeed, on 26 July 1988 as follows:

In his Written Answer on 19 July to your question about the declaration of exclusive economic zones around many of our Dependent Territories, David Mellor promised to write giving details of the present position regarding maritime jurisdiction. You subsequently spoke to me about this. Details are as follows:

(a) *The Pitcairn Islands*: There is an exclusive fisheries zone extending to a maximum of 200 n. miles measured from each island. In 1983, we concluded an agreement with France on the maritime boundary between Pitcairn and neighbouring French islands (Cmnd. 9136).

(b) *British Indian Ocean Territory*: There is an exclusive fisheries zone of 12 n. miles.

(c) *South Shetland Islands* and (e) *South Orkney Islands*: These islands are part of the British Antarctic Territory, where no fisheries zone has been declared beyond the territorial sea. The Convention on the Conservation of Antarctic Marine Living Resources applies to Antarctic waters.

(d) *South Sandwich Islands* and (g) *South Georgia*: These islands constitute a single territory known as South Georgia and the South Sandwich Islands. There

is no fisheries zone beyond the territorial sea. The Convention on the Conservation of Antarctic Marine Living Resources applies to the waters around the Territory.

(f) *Bermuda*: an exclusive fisheries zone of 200 n. miles has been declared.

(g) *Gibraltar*: No fisheries zone has been declared beyond the territorial sea.

(h) *Anguilla*, (i) *British Virgin Islands*, (j) *Cayman Islands*, (k) *Montserrat*, (l) *Turks and Caicos Islands*, (m) *Ascension Island*, (n) *St Helena*, (o) *Tristan da Cunha*: Exclusive fisheries zones of 200 n. miles have been declared in each case.

(p) *Falkland Islands*: An exclusive fisheries zone of 150 n. miles from the centre of the Islands has been declared. The Government's Declaration of 29 October 1986 also set out our entitlement to a zone extending to a maximum of 200 n. miles, as well as to a continental shelf. The Falkland Islands (Continental Shelf) Order 1950 remains in force (SI 1950 No. 2100).

Discussions are in progress with the Government of the Turks and Caicos Islands about legislation to do with the continental shelf.

As I told you when you raised the points, I had not until then been concerned with your [Parliamentary Question]. But the position is indeed as I suggested—that in considering questions to do with maritime zones we do have to look at the case of each Dependent Territory. Separately we take into account in particular the views of the local government, the needs of the offshore industries and, in certain cases, wider political factors including sovereignty disputes.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate on the subject of fisheries protection in the Falkland Islands, the Minister for Defence Procurement, Lord Trefgarne, referred to a suggestion made in the debate that the protection zone be increased to a radius of 200 miles. He went on:

As for extending the zone as the noble Lord suggests, there is an undoubted entitlement to extend the zone to 200 miles, but the limit was established at 150 miles for conservation reasons. It is a conservation measure and not a political or military measure. That was the consideration which persuaded us that 150 miles was the right radius.

...

I cannot agree that this was other than a conservation measure. The Falklands intermediate conservation zone was established for conservation reasons and for no other. That consideration persuaded us that 150 miles was the right limit. It encompassed the fishing grounds and had no other significance. That is the reason it will be left at that radius for the time being.

(HL Debs., vol. 500, col. 382: 28 July 1988)

Part Nine: X. Seas, waterways, ships—exclusive economic zone

In reply to the question what were the intentions of Her Majesty's Government with respect to the declaration of an exclusive economic zone around each of the dependent territories, the Minister of State, Foreign and Commonwealth Office, wrote in part:

Maritime zones are declared on a case-by-case basis, taking into account all factors relevant to each case. We do not believe that there would be practical

advantage in declaring EEZs around dependent territories, nor for that matter the United Kingdom, at present. Exclusive fisheries zones have already been declared around most territories listed while, in accordance with international law, exclusive rights over the continental shelf are inherent.

(HC Debs., vol. 137, Written Answers, col. 548: 19 July 1988; for a further reply to this question, see Part Nine: IX. (item of 26 July 1988), above)

Part Nine: XII. *Seas, waterways, ships—bed of the sea beyond national jurisdiction*

In reply to a question about British companies intending to mine the deep sea-bed, the Secretary of State for Trade and Industry wrote:

The Secretary of State for Trade and Industry issued an exploration licence in 1984 under The Deep Sea Mining (Temporary Provisions) Act, 1981, to the Kennecott Consortium in which three British companies, British Petroleum, Rio Tinto Zinc Corporation Plc, and Consolidated Gold Fields Plc, have an interest. No British company has indicated an intention to commence sea-bed mining at the present time and no application has been received for a licence to undertake exploitation activity.

(HL Debs., vol. 494, col. 690: 9 March 1988)

In reply to a further question, the same Minister wrote:

The United Kingdom participated fully in the negotiations which led to the Agreement on the Resolution of Practical Problems With Respect to Deep Seabed Mining Areas. The agreement was signed on 14th August 1987. The United Kingdom is associated with it by an Exchange of Notes with the Soviet Union, and as a consequence, is subject to, and has the benefit of, its provisions. The texts will be published in due course.

(Ibid., col. 787: 9 March 1988)

The following letter was published, undated, in the issue of the UN *Law of the Sea Bulletin* dated July 1988:

The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to transmit herewith, in the annex to this note, the co-ordinates defining the site (known as 'Frigate Bird') for which the Secretary of State for Trade and Industry issued a licence on 21 December 1984, pursuant to the United Kingdom Deep Sea Mining (Exploration Licences) Regulations 1984. The licence was issued to BP Petroleum Developments Ltd, RTZ Deep Sea Mining Enterprises Ltd, Consolidated Goldfields PLC, the Kennecott Corporation, the Mitsubishi Corporation and the Noranda Exploration Inc (the Kennecott Consortium). It was assigned to the Sohio Electro-Minerals Company (UK) Ltd on 6 February 1985, and subsequently to the Carborundum Company Ltd on 10 April 1987, which now holds the licence on behalf of the licensees.

The Permanent Mission would be grateful if the information in this note and its annex could be published in the next issue of United Nations *Law of the Sea Bulletin*.

Annex

DESCRIPTION OF 'FRIGATE BIRD' SITE AREA

The area of the application is encompassed by and extends to geodesics drawn between the geodetic co-ordinates numbered in series below:

From:

- | | |
|-------------------------------------|------------------------|
| (1) North Latitude 11°00' | West Longitude 116°04' |
| A geodesic line drawn northerly to: | |
| (2) North Latitude 12°00' | West Longitude 116°04' |
| A geodesic line drawn westerly to: | |
| (3) North Latitude 12°00' | West Longitude 118°00' |
| A geodesic line drawn northerly to: | |
| (4) North Latitude 13°26' | West Longitude 118°00' |
| A geodesic line drawn westerly to: | |
| (5) North Latitude 13°26' | West Longitude 118°40' |
| A geodesic line drawn northerly to: | |
| (6) North Latitude 13°30' | West Longitude 118°40' |
| A geodesic line drawn westerly to: | |
| (7) North Latitude 13°30' | West Longitude 119°15' |
| A geodesic line drawn northerly to: | |
| (8) North Latitude 13°45' | West Longitude 119°15' |
| A geodesic line drawn westerly to: | |
| (9) North Latitude 13°45' | West Longitude 119°30' |
| A geodesic line drawn northerly to: | |
| (10) North Latitude 14°30' | West Longitude 119°30' |
| A geodesic line drawn easterly to: | |
| (11) North Latitude 14°30' | West Longitude 118°15' |
| A geodesic line drawn northerly to: | |
| (12) North Latitude 14°45' | West Longitude 118°15' |
| A geodesic line drawn easterly to: | |
| (13) North Latitude 14°45' | West Longitude 117°15' |
| A geodesic line drawn northerly to: | |
| (14) North Latitude 14°58' | West Longitude 117°15' |
| A geodesic line drawn easterly to: | |
| (15) North Latitude 14°58' | West Longitude 116°00' |
| A geodesic line drawn southerly to: | |
| (16) North Latitude 14°00' | West Longitude 116°00' |
| A geodesic line drawn easterly to: | |
| (17) North Latitude 14°00' | West Longitude 115°00' |
| A geodesic line drawn southerly to: | |
| (18) North Latitude 13°00' | West Longitude 115°00' |
| A geodesic line drawn westerly to: | |
| (19) North Latitude 13°00' | West Longitude 115°20' |
| A geodesic line drawn southerly to: | |
| (20) North Latitude 11°00' | West Longitude 115°20' |
| A geodesic line drawn westerly to: | |
| (1) The point of beginning. | |

(UN *Law of the Sea Bulletin*, Issue No. 11, pp. 59-60)

In an explanation of vote in the UN General Assembly on 1 November 1988 on a resolution concerning the law of the sea, the UK representative, Mr I. Macleod, stated:

My delegation has abstained in the vote which has just been taken on the draft Resolution for the Plenary and I would like to set out the reasons.

The United Kingdom recognises the great importance for the States of the world of maritime affairs and the Law of the Sea. The importance of achieving agreement on generally accepted regimes in the Law of the Sea is obvious.

We therefore welcome the work of the Secretariat in endeavouring to carry forward the implementation of generally accepted regimes where these were successfully developed during the course of the third UN Conference on the Law of the Sea. The Secretariat is working in the best traditions of the United Nations in carrying forward this work.

We also welcome the progress which has been made in the work of the Preparatory Commission, including the registration of seven pioneer applicants under Resolution 2, despite our well-known views as to the defects in the deep sea bed mining regime envisaged in the Convention of 1982. The Preparatory Commission is only beginning to tackle difficult subjects such as the transfer of technology which are crucial to the development of a satisfactory regime for deep sea bed mining. It is to be hoped that, in further discussions within the Preparatory Commission and outside, account will be taken of certain changes in the realities of deep sea bed mining where the expectations of the 1970s do not correspond to the requirements of a satisfactory deep sea bed mining regime today. The Convention reflects a position where it was thought that actual production might well begin after 1988, this very year, whereas we all know now that it is unlikely to begin before the end of the century, if then. My delegation could reasonably have hoped that the Resolution might have taken account of the need to remedy the defects which many delegations have seen in the deep sea mining regime as envisaged in the Convention and that it would have looked forward to further work to deal with these defects. But, since the Resolution before us substantially follows that put before Plenary last year, my delegation has abstained in the vote.

(Text provided by the Foreign and Commonwealth Office; see also A/43/PV.41, pp. 82-3)

Part Nine: XIV. *Seas, waterways, ships—international regime of the sea in general*

(See Part Six: II. D. and Part Nine: XII. (item of 1 November 1988), above)

Part Nine: XV. B. *Seas, waterways, ships—ships—nationality*

In reply to the question what proportion of British or British dependency ownership of the parent company is required for a merchant ship to qualify for accompaniment by the Armilla patrol in the Gulf, the Minister of State for the Armed Forces wrote:

Ships eligible for R[oyal] N[avy] protection are those registered in the United

Kingdom or dependent territories, or those where there is a clear majority United Kingdom or dependent territory interest in the ownership.

(HC Debs., vol. 126, Written Answers, col. 445: 1 February 1988)

The following paragraphs appeared in a memorandum prepared by the Foreign and Commonwealth Office in April 1988 for the Foreign Affairs Committee of the House of Commons investigating current UK policy towards the Iran/Iraq conflict:

Reflagging Of Merchant Vessels To British Registers

8. Statistics held by the Department of Transport on shipping registrations for 1986 were by tonnage only. However it has been possible to ascertain that no tankers 'flagged-in' during that year. In 1987 a total of 25 tankers 'flagged-in' and, significantly, 50 moved ports of registry within the British registers. Only four Gulf (Kuwaiti)-registered tankers 'flagged-in' 1987. They were able to do so because they fulfilled the necessary administrative criteria. There are no provisions in UK legislation for refusal on other than purely technical grounds.

9. Companies choose to register vessels in the UK and Dependent Territories for a variety of reasons. These include financial or fiscal reasons (especially in the case of Dependent Territory registers), for example cheaper registration, crewing costs and lower taxes. Against the background of a decline in the size of the UK merchant fleet, it is in the wider British interest to attract such registrations to the extent that this is compatible with maintaining appropriate standards and efficiency. To this end, the major Dependent Territory registers (Bermuda, Gibraltar and the Cayman Islands) are in the process of upgrading their standards to equip them to cope with the relatively large tonnages now being attracted to them.

10. As has been pointed out, there is no evidence of large-scale 'flagging-in' to the British registers specifically to obtain Royal Navy protection in the Gulf. In any case, the Government have consistently made it clear that this protection is not an automatic entitlement, and furthermore is only available within a limited geographical area. Both Governments and shipowners are left in no doubt of this position.

(*Parliamentary Papers*, 1987-8, HC, Paper 279-II, p. 110)

In reply to a question on the subject of the 'flagging-out' procedure in the Gulf, the Minister of State for Defence Procurement, Lord Trefgarne, stated:

... entitled ships are those either on the register of the United Kingdom or a dependent territory, or ships substantially owned by persons so entitled; in other words, substantially owned by a United Kingdom organisation or a dependent territory organisation. Thus, it follows that any ship which is flagged out but retains ownership as before would still normally be entitled to accompaniment by the Royal Navy.

(HL Debs., vol. 498, col. 264: 15 June 1988)

In reply to the question what progress has been made in negotiations

with flag of convenience States to help ensure the availability of flagged-out British-owned ships in the event of crisis or war, the Secretary of State for Transport wrote:

On 28 June representatives of Her Majesty's Government and the Commonwealth of the Bahamas signed a memorandum of understanding under which the Government of the Bahamas agreed to allow British-controlled ships to be made readily available to Her Majesty's Government in the event of crisis and war. In doing so, the Bahamas have agreed to waive their sovereign authority over those vessels at such a time.

This is the first such agreement we have reached with an open registry state; we hope, however, that others will follow later this year.

British shipowners who agree to make their vessels available to Her Majesty's Government under this memorandum of understanding will be eligible for war risks insurance under arrangements that have recently been concluded with the British War Risks Associations.

(HC Debs., vol. 136, Written Answers, col. 681: 7 July 1988)

Part Nine: XV. C. *Seas, waterways, ships—ships—diplomatic and consular protection*

At a press conference held by the Foreign and Commonwealth Office on 18 May 1988, the following statement was made:

Spokesman stated that the Iraqi Ambassador had been summoned yesterday to call on a senior FCO official at our request to receive a strong protest at a serious attack on the *Burmah Endeavour*, a UK registered vessel, off Larak Island in the Southern Gulf on 14 May. The Ambassador was told that the attack was premeditated, unprovoked and unlawful. It was also in clear violence of the mandatory Security Council Resolution 598 of 20 July 1987 which the Government of Iraq had accepted. The Government reserved the right to claim compensation from the Iraqi Government and sought an assurance from the government of Iraq that any such deliberate and unjustified attacks on unarmed British merchant vessels will not be repeated.

(Text provided by the Foreign and Commonwealth Office)

Part Nine: XV. D. *Seas, waterways, ships—ships—jurisdiction*

In the course of a debate on the second reading in the House of Commons of the Merchant Shipping Bill, the Secretary of State for Transport, Mr Paul Channon, stated:

I come now to the international implications of the programme. I made it clear in July that certain crucial measures would need to be applied to all passenger ferries sailing from United Kingdom ports, regardless of flag. As our programme has developed, we have concluded that the majority of our measures ought to be applied in this way. But I do not wish to leave it at that.

Marine safety worldwide is dealt with by the International Maritime Organisation. Members will be aware that organisation is extremely successful. It has had a series of safety conventions and, over the past few years, it has provided a great

many benefits to scafarers and travellers all over the world. In November, I personally took an initiative at the IMO's assembly with the aim of obtaining early worldwide agreement—under the IMO's accelerated procedures—to many of the measures we have proposed, without, of course, prejudicing our right to require foreign vessels to conform, when in our ports, to requirements under our own laws pending international agreement. We have obtained the assembly's endorsement of a resolution that we proposed and I am hopeful of real progress in the not too distant future. So we are pressing ahead domestically and internationally.

(HC Debs., vol. 126, col. 506: 28 January 1988)

During discussion in a House of Commons Standing Committee on the Merchant Shipping Bill, attention was drawn to a draft provision that 'a ship shall be a British ship for the purposes of the Merchant Shipping Acts if . . . the ship is registered under the law of a relevant overseas territory'. The Minister for Public Transport, Mr David Mitchell, observed:

The relevant overseas territories are all British Crown dependencies and British dependent territories. The United Kingdom has international obligations for all ships under its ultimate jurisdiction including those registered in those territories and it would be inappropriate for such ships to be treated as other than British for the purposes of registration.

The existence of the dependent territory registers has some positive advantages. It offers UK shipowners a low-cost alternative to mainland registry without which they would almost certainly flag out further afield to registers with no connection with the United Kingdom. Ships on the dependent territory registers are available for defence needs in time of emergency and it is important that they should remain available.

(HC Standing Committee B, Merchant Shipping Bill, col. 6: 11 February 1988)

In moving the approval of the Merchant Shipping (Closing of Openings in Enclosed Superstructures and in Bulkheads above the Bulkhead Deck) (Application to Non-United Kingdom Ships) Regulations 1988, the Parliamentary Under-Secretary of State, Department of Transport, Lord Brabazon of Tara, stated in part:

These regulations would extend to foreign ships when in UK waters the provisions of two sets of regulations which are already in force for UK ships. Both orders are required to be made by affirmative procedure by terms of Section 21(1) of the 1979 Merchant Shipping Act, the enabling power, and by Section 49 of that Act, which sets out the Parliamentary procedures for Section 21 orders. Both sections were modified by Section 11 of the Safety at Sea Act 1986. In summary, the requirement of the enabling legislation is that orders applying to foreign ships must be made by affirmative procedure unless the requirement is the subject of international agreement.

[This order] deals with the immediate cause of the loss of the 'Herald of Free Enterprise', which was that she put to sea with her bow doors open. In fact, the Government are following the recommendations of the Sheen Report and introducing no fewer than four new requirements to prevent a recurrence of those events. Two of them concern equipment; namely, the requirements to fit indicator

lights and closed circuit television to the loading doors—requirements which are already in force. The other two are of an operational nature and are applied to foreign ships by this first set of regulations before the House, which would extend to them the provisions of the Merchant Shipping (Closing of Openings in Closed Superstructures and in Bulkheads above the Bulkhead Deck) Regulations 1988; Statutory Instrument No. 317. That order has been in force for UK ships since 9th March.

(HL Debs., vol. 495, col. 162: 22 March 1988)

Part Ten: I. *Air space, outer space—sovereignty over air space*

(See Part Thirteen: I. D. (item of 7 September 1988), below)

Part Ten: II. A. 2. *Air Space, outer space—air navigation—civil aviation—treaty regime*

In reply to a question, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated:

... there are already a number of relevant international conventions to deal with international co-operation on aircraft terrorism; such as, the 1963 Tokyo Convention, which required states to take all appropriate measures to restore unlawfully seized aircraft which land within their territory to lawful control. There was also the 1970 Hague Convention and the 1971 Montreal Convention which are also concerned with ensuring that offenders are brought to justice. The International Civil Aviation Organisation also produced guidance on responses to hijacking.

(HL Debs., vol. 497, col. 321: 18 May 1988)

Part Eleven: II. A. 1. *Responsibility—responsible entities—States—elements of responsibility*

In a speech in the Sixth Committee of the UN General Assembly on 2 November 1988, the UK representative, Mr A.D. Watts, examined the International Law Commission's draft articles on the subject of international liability for injurious consequences arising out of acts not prohibited by international law. He observed:

... my delegation attaches great importance to bearing in mind at every stage in our discussion of this topic, and particularly when discussing questions of liability and reparation, that we are concerned with activities which, by definition, are not prohibited by international law. Those activities are essentially lawful, and this fact makes it appropriate to exercise considerable caution before attaching to them far reaching consequences touching the responsibility of States.

I should now like to turn to more specific points arising on some of the draft articles which the Special Rapporteur has submitted in his fourth report, as set out in paragraph 22 of the ILC's report to the General Assembly.

Three points arise on *article 1*.

First, the United Kingdom delegation notes the comments in paragraphs 54 and 55 of the ILC's Report about the need for the scope of the articles to be limited to certain activities having physical consequences. The Special Rapporteur agreed

that a reference to 'physical consequences' should be reintroduced in article 1; my delegation supports that conclusion.

Second, my delegation sees considerable disadvantage in relying, in article 1, on the concept of jurisdiction to determine the link between the risk-creating activity and the State in question. The ILC's Report contains much discussion of this. It is clear from that discussion, and indeed from any consideration of the concept of jurisdiction in national and international law, that the concept lacks precision and clarity. Quite apart from the divergent views of States as to their entitlement to jurisdiction (in particular the problems caused by claims to exercise extra-territorial jurisdiction) and the confusion created by overlapping jurisdiction, the United Kingdom delegation would draw attention to the fact that, even within a given State, jurisdiction is not a single concept. It varies in its content, depending, for example, on whether one is referring to the jurisdiction of a State to prescribe law, the jurisdiction of a State to enforce law, or the jurisdiction of courts to determine questions arising from the application of law. If the term 'jurisdiction' is to be used, it seems essential to make clear in which sense it is being used. Paragraph 61 of the ILC's Report states that the Special Rapporteur was of the view that under this topic 'jurisdiction' included the competence to make law *and* apply it to certain activities or events. That double condition is certainly one which bears further consideration, but if it is to be adopted it needs to be specified clearly in the draft article, since it does not follow automatically from the use of the simple term 'jurisdiction'.

In this context, it is perhaps worth bearing in mind one of the general comments which I made, namely that in developing the law in new areas there can be dangers in seeking theoretical comprehensiveness. The term 'jurisdiction' has been used in an attempt to cover all possible situations which might arise and for which the notion of territory was considered inadequate. I have to say that the United Kingdom delegation is not convinced that the text does in fact deal satisfactorily with all possible situations. But in resorting to the concept of jurisdiction the text certainly introduces confusion even in respect of those situations which in practice account for the vast majority of occurrences with which the draft articles attempt to deal. These are activities occurring within a State's territory, or territory over which it exercises effective control; and possibly those occurring on the high seas through ships flying its flag. Articles which concentrated in clear terms on those areas would deal with most of the practical problems we face, without running into the theoretical difficulties to which the search for comprehensiveness leads, particularly in relation to the difficult concept of jurisdiction.

The third point arising on article 1 concerns the requirement that an activity, to come within the scope of the draft articles, must be such as to create an appreciable risk of causing trans-boundary injury. The United Kingdom delegation considers this introduction of the element of risk helpful in establishing an acceptable framework for the draft articles. It reflects the view that at the heart of this topic lies the notion of activities which are dangerous. While it would, as my delegation has said in previous years, be wrong to limit the topic to activities which are ultra-hazardous, it would equally be unwise to try to cover activities which, at the relevant time, are not perceived to carry with them any significant risk. The attribution of liability for harmful consequences of non-risk activities raises different issues from those which arise when there is known to be a risk; at this stage in the development of this branch of the law it seems to the United Kingdom delegation

better for the draft articles to be limited to those activities which carry with them a degree of risk.

Once risk is established in relation to an activity, it is appropriate for certain obligations prescribed in the draft articles to apply—especially those relating to cooperation and prevention. Indeed, without a risk test, it would hardly be possible to apply such provisions.

Physical harm is, in the view of the United Kingdom delegation, a necessary requirement for the existence of liability and any obligation to make reparation. Harm flowing from an activity previously seen to carry with it certain risks should give rise to liability if other appropriate conditions are satisfied. Whether harm alone, flowing from activity not previously perceived to carry with it any significant risk, should give rise to liability is a matter on which my delegation retains an open mind. Although there is a growing tendency in national legislation to adopt absolute liability and no-fault principles, this has to be set in the context of national structures which do not yet have their counterpart at the international level. At the least, principles of liability and reparation probably have to be different where the harm flows from an activity not perceived as involving significant risk, from what they should be where the risk was clearly foreseen. It must also be remembered that not only is the activity itself by definition lawful, but in the no-risk situation those who cause the injury and those who suffer from it can *both* be regarded as ‘innocent’.

To the extent that risk is relevant, there is a question as to the degree of risk required. Article 1—and some other articles—are drafted in terms of the risk being ‘appreciable’. To the United Kingdom delegation this does not seem an appropriate adjective in this context, mainly because it is ambiguous. In a very literal sense, something is appreciable if it exists in sufficient quantity, however small, to be capable of being appreciated—in other words, if it is detectable or identifiable. That is not, I understand from the ILC’s Report, what is intended. The intention appears to be to refer to risks which are greater than normal (paragraph 62). In other words, the intention is to exclude risks which might be regarded as *de minimis*. If that is so, it would seem to my delegation clearer, and more accurate, to talk about significant risks, or a risk of significant effects, and it could be useful specifically to add that *de minimis* effects are excluded.

Turning to *article 3*, some comments in the ILC’s Report cause the United Kingdom delegation some concern. It seems, for example from paragraphs 68, 69 and 71, that the Special Rapporteur understands the article to contain a presumption that the State of origin knew or had means of knowing about the risky activity being carried out, which presumption could be rebutted by the State of origin if it showed evidence to the contrary. I have to say, Mr Chairman, that I see nothing in the text of article 3 establishing any such presumption. And I have to add, particularly in view of the general comments which I made at the beginning of my remarks, that my delegation would not regard any such general change in the burden of proof as appropriate.

Turning to *article 7*, my delegation can accept in principle the desirability of States cooperating in preventing or minimising trans-boundary injuries. The United Kingdom delegation believes, however, that the scope and content of the cooperation which is required should be made clear. Paragraph 87 of the ILC’s Report explains that the principle of cooperation underlies the provisions of the draft articles relating to notification, exchange of information and the taking of pre-

ventive measures. Preventive measures are dealt with in article 9, but no express provision is made about notification or exchange of information: in the view of the United Kingdom delegation such express provisions should be included in the draft articles. Similarly, cooperation as a principle needs translating in practice into cooperation between particular States: the identification of those States, especially in relation to preventative action concerning possible future injury, is not straightforward and requires further consideration and clarification.

Article 8 concerns the action likely to follow from adequate provisions on notification and exchange information. Again, however, the article, in the view of the United Kingdom delegation, leaves too much to implication. In particular, while article 8 indicates the general purposes of participation, it says nothing about the processes in which States likely to be affected should participate—the text leaves unanswered the question, ‘participation in what?’ One answer is provided in paragraph 90 of the ILC’s Report: this says that the State of origin should permit participation by States exposed to a potential risk in choosing means of prevention, which would cover the procedural steps for prevention. If this is the intended scope of the obligation to permit participation, it should be made clear in article 8 itself.

It is difficult to comment in detail on *article 10*, since it is dependent upon criteria to be laid down elsewhere in the draft articles, and we do not yet know what these criteria are to be. On the face of article 10 as it stands at the moment, while the implementation of the duty to make reparation would seem to be a matter for negotiation, the duty itself could be seen to be a matter of strict—or possibly even absolute—liability. As the ILC’s Report acknowledges, in paragraph 98, the introduction of strict liability in this context would be likely to encounter the resistance of a great many governments. It may be that at the present stage I can do no more than register this point of concern, and express the hope that the matter will be satisfactorily clarified in the criteria which will in due course be elaborated. These should deal, *inter alia*, with the question of the standard of liability, and associated questions concerning the permissible defences and exceptions to liability.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/43/SR.27, pp. 13–16)

Part Eleven II. A. 6. Responsibility—responsible entities—States—reparation

(See also Part Five: IV. (p. 478), Part Nine: XV. C. and Part Eleven: II. A. 1., above)

On 25 February 1988, the Governments of the UK and Grenada concluded an Agreement concerning the Promotion and Reciprocal Protection of Investments. The following articles are contained in the Agreement:

ARTICLE 4

Compensation for Losses

(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other

settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State.

(2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from

- (a) requisition of their property by its forces or authorities, or
- (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

ARTICLE 5

Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

ARTICLE 6

Repatriation of Investment and Returns

(1) Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer to the country where they reside of their investments and returns, subject to the right of each Contracting Party in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws. Such powers shall not however be used to impede the transfer of profit, interest, dividends, royalties or fees; as regards investments and any other form of return, transfer of a minimum of 20 per cent a year is guaranteed.

(2) Transfers of currency shall be effected without delay in the convertible cur-

rency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

(UKTS No. 33 (1988); Cm. 381)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Foreign Compensation Commission has now completed the determination and evaluation of claims against the Czech fund. It is hoped to make a payout of 100 per cent. of the assessed value of claims to all successful claimants by the end of May. This will exhaust the balance in the Czech fund of approximately £4 million on the assumption that all applicants accept payment.

(HC Debs., vol. 132, Written Answers, col. 580 : 5 May 1988)

In reply to a question on the subject of payments to UK citizens entitled to compensation for confiscation of their property during the Bolshevik revolution in 1917, the Minister of State, Foreign and Commonwealth Office, wrote:

It is hoped that payments to successful property claimants will be made towards the end of 1989. At the same time, a final payment will be made to successful bond claimants who received an interim payment of 10 per cent. of the face value of a bond at the end of last year.

(HC Debs., vol. 133, Written Answers, col. 206 : 12 May 1988)

In reply to the question whether Her Majesty's Government will seek compensation for the surviving former British military personnel held prisoner by Japan during the Second World War, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

No. Under the terms of the 1951 treaty of peace with Japan certain sums were made available to the United Kingdom. Article 14 provided for payment of 'reparations to the Allied Powers' and article 16 for indemnification of 'those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan.'

Article 14(b) of the peace treaty waived all reparations claims of the Allied powers and their nationals except as otherwise provided in the treaty.

(HC Debs., vol. 133, Written Answers, col. 505 : 18 May 1988)

On 6 July 1988, the Governments of the UK and Iran concluded an Exchange of Notes concerning the settlement of mutual claims in respect of damage incurred to the diplomatic premises of the UK in Iran and the Islamic Republic of Iran in London. Among the provisions of the agreement were the following:

- (a) the Government of the United Kingdom of Great Britain and Northern Ireland shall pay to the Government of the Islamic Republic of Iran the sum of £1.82 million in respect of the damage incurred on 5 May 1980 at the Embassy premises belonging to the Islamic Republic of Iran at 16 Prince's Gate,

Westminster. The Government of the Islamic Republic of Iran shall not pursue any claim against the Government of the United Kingdom of Great Britain and Northern Ireland or any United Kingdom authority in respect of the above-mentioned damage;

- (b) the Government of the Islamic Republic of Iran shall pay to the Government of the United Kingdom of Great Britain and Northern Ireland the sum of Rials 120 million in respect of damage incurred between 1978 and 1980 at the buildings of the British Embassy and of the British Council in the Islamic Republic of Iran. The Government of the United Kingdom of Great Britain and Northern Ireland shall not pursue any claim against the Government of the Islamic Republic of Iran or any Iranian authority in respect of the above-mentioned damage;

(UKTS No. 65 (1988); Cm. 480)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The 1959 United Kingdom—Egyptian Financial and Property Agreement (Cmnd 723) provided for the return of all sequestrated British property and for the payment of compensation for damage thereto in full. In our view, both the Egyptian and British Governments have fully discharged their obligations under this agreement.

(HC Debs., vol. 136, Written Answers, cols. 611–12: 6 July 1988)

In the course of a debate on the subject of compensation for former British prisoners of war taken by Japan, the Minister of State, Foreign and Commonwealth Office, Mr David Mellor, stated:

... the treaty of peace with Japan was signed by a Labour Government and ratified by their Conservative successors. The British delegation led the way in insisting that there should be a specific provision for compensation for former prisoners of war. That was not in the original treaty, and it is an unusual provision in a peace treaty, which reflects the uniquely dreadful treatment suffered by our service men in the far east.

As we know, the result was the peace treaty signed in San Francisco on 8 September 1951, which formally brought to an end the state of war between the United Kingdom and Japan. The treaty contained a number of articles, of which two are particularly germane. Article 14 concerned the general question of compensation and recognised that reparation should be made. It gave the allied powers the right to seize and dispose of Japanese property, which, alas, ... I fear cannot be readily evaded. Article 14(b) concludes with these words:

‘Except as otherwise provided in the present Treaty the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war ...’.

Article 16 makes specific provision for the compensation of prisoners. That is what we might call the British article, upon which we insisted. Under that article, the sum of £4.5 million was paid and there was an agreed minute between the Japanese and the allied powers recording that payment and stating that the payment would be recognised ‘as a full discharge by the Japanese Government of its

obligations under Article 16 of the Peace Treaty'. Out of that, we in the United Kingdom received just over £1.6 million. That was made available to the former far east prisoners of war. The sum that has been described was the sum that was paid. Although the sum of £76 was worth a good deal more in 1952 than it is today, I well understand and appreciate that it was an extremely small sum.

Mr Mellor later added:

We believe that the treaty that was signed is binding on us and was a full and final settlement. Whether it is right or wrong, that is the position today and we do not see any way round it. I can assure my right hon. Friend that it is not wilfulness on our part; that is just the best objective interpretation that we can give. Every Government have had to defend that position and give such an interpretation over the past 40 years, and I fear that I have no authority to diverge from that.

We can only rest on the fact that it is the function of peace treaties to put an end to claims. If that were not so, we would still be concerned about disputes throughout the centuries. No compensation would be adequate to meet the sufferings of the people concerned. I understand that this compensation will seem to many people peculiarly inadequate, but we can find no legal basis for going back to the Japanese Government and asking for more. It has been the opinion of successive Governments, and it remains the opinion of this Government, based as best we can on an objective assessment of the documents, that to seek to go back on the undertakings to which we put our signature would not be an act of good faith and could not be justified.

(HC Debs., vol. 137, cols. 1421–2: 21 July 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Albania has still not paid the compensation of £843,947 awarded to Britain by the International Court of Justice in 1949.

(HC Debs., vol. 140, Written Answers, col. 269: 10 November 1988)

Part Eleven: II. A. 7. (a). *Responsibility—responsible entities—States—procedure—diplomatic and consular protection*

In the course of a debate on the situation of Mr R.C. Arnold, a manager of the Galveias farm in the Alentejo area of Portugal, expropriated by the Portuguese Government in 1975, the Minister of State, Foreign and Commonwealth Office, Mrs Lynda Chalker, stated:

First, let me express to Mr Arnold and his partner the Government's sympathy for the considerable financial loss which they have sustained. I share my hon. Friend's sense of frustration and that of Mr Arnold, that despite the enormously long lapse of time, no compensation has yet been made. I hope that I can demonstrate to the House that this is not due to a lack of vigorous and continuous action by this Government or our predecessors. It is due to a lack of response from those who alone can make the positive decision to alter this wrong state of affairs.

The Galveias farm was one of nine British-owned or rented farms in the Alentejo

area which were expropriated in 1974-75. The British were not the only ones to have their farms expropriated: Portuguese, Germans, Belgians and other nationalities were also faced with the loss of their livelihood.

It was not for the British Government to negotiate the terms of compensation with the Portuguese. Our role was to do what we could to ensure that compensation was paid. To this end, successive British Governments have made repeated calls on the Portuguese Government on behalf of the owners of the nine expropriated British farms.

We finally appeared to be getting somewhere when in 1983, five of the original nine farms were returned to their original owners. We believed then that a satisfactory solution for the other four claims was at hand. I am as cross and disappointed as they that our good friends the Portuguese, which they are, have not found it possible to resolve these four remaining claims. The Galveias farm issue and the other three claims are of grave concern which I will raise next week when I see the Portuguese Minister for Foreign Affairs in Luxembourg at the Foreign Affairs Council. I have arranged for the ambassador to have a copy of this debate tomorrow so that he will be fully aware of the seriousness with which we regard this issue.

During her visit to Portugal in April 1984, my right hon. Friend the Prime Minister discussed the question with the then Portuguese Prime Minister, who is now the President, Dr Mario Soares. They agreed that the issue should be resolved by officials. We continued persistently to lobby in both London and Lisbon.

The Portuguese Government set up an inter-ministerial commission in November 1984 to investigate the claims. Our efforts seemed about to succeed when the inter-ministerial commission accepted the principle of the claim lodged by Mr Arnold and his partners, and set a deadline for the case to be resolved by the end of April 1985. Any optimism again proved to be illusory. In the summer of 1985, the Portuguese National Assembly was dissolved, elections were called and again the decision-making process ground to a halt. But our ambassador in Lisbon continued to press for a resolution of the case as soon as the new Government were in place.

In January 1986, the ambassador raised the question with the new Prime Minister, Professor Cavaco Silva. The ambassador provided him with a list of the claims and Professor Cavaco Silva promised to get the new Minister of Finance to look into the matter. The embassy followed up by leaving an aide memoire with the Foreign Ministry in February. On 12 May 1986, when Professor Cavaco Silva called on my right hon. Friend the Prime Minister in London, she again pressed for a speedy resolution of the problem. Professor Cavaco Silva told her that a settlement was close and only the amount had to be decided. I visited Lisbon later that month and I took up the issue. Despite constant pressure from our embassy in Lisbon, no sign of a satisfactory conclusion has appeared.

... on 28 November 1986, my right hon. Friend sent another message to Professor Cavaco Silva expressing her concern that the problem had still not been overcome. In reply, Professor Cavaco Silva said that the commission report evaluating the four outstanding claims had just been completed. We subsequently learned from the Portuguese embassy that the report had been agreed and that the way was clear for direct negotiations with the claimants.

Pressure on the Portuguese Government continued throughout last year. In particular, my right hon. and learned Friend, the Foreign Secretary raised the matter

with the Portuguese Foreign Minister when they met on 15 June and again on 22 June.

The Portuguese elections in July last year again delayed progress. The ambassador raised the matter with the Secretary-General of the Portuguese Foreign Ministry in September, as soon as the composition of the new Government was known, and with the Foreign Minister in October. The next part of the litany is that the ambassador reminded the Foreign Minister of the assurances given by the present and previous Governments to settle the claims, and referred in particular to Professor Cavaco Silva's remarks to the Prime Minister in May 1986.

Our ambassador again emphasised that the delay in settling the claims was becoming intolerable and that we did not want the issue to cast a shadow over our otherwise excellent relations. He warned the Portuguese that adverse publicity could be expected if a settlement was not reached soon. The Foreign Minister said that he appreciated the seriousness of the matter and that he would do what he could to clear it up.

Shortly before the visit of the Portuguese Prime Minister to London in March this year, the Portuguese Ministry of Foreign Affairs notified our embassy in Lisbon that the Portuguese were prepared to compensate, as my hon. Friend has said, 'in a just way.' They said that they now had sufficient information to allow them to enter into direct negotiations with the parties concerned or their representatives.

I must tell the House that, when my right hon. Friend the Prime Minister saw Professor Cavaco Silva in London on 11 March, she again impressed on him the need to resolve the issue quickly. The embassy in Lisbon subsequently told all the claimants that they should make the necessary contact with the Foreign ministry and that the four British claimants have now provided full details of their claims to the Portuguese Foreign Ministry. Only last week, our ambassador also spoke again to the new Secretary-General of the Foreign Ministry . . .

(HC Debs., vol. 134: cols. 821-3: 7 June 1988)

In reply to the question what action is Her Majesty's Government taking in the light of further adjournment in the Egyptian court of a case brought by Mr Douglas Forsyth, the Minister of State, Foreign and Commonwealth Office, wrote in part:

Representations to expedite the hearing of Mr Forsyth's appeal before the Egyptian courts were made. The court's determination was announced on 22 June. We have not yet received a reply to our request to the Egyptian Government for any proposals they may have to assist Mr Forsyth in obtaining vacant possession of his property.

(HC Debs., vol. 136, Written Answers, col. 612: 6 July 1988; see also UKMIL 1985, pp. 508-9)

Part Eleven: II. A. 7. (a). (i). *Responsibility—responsible entities—States—procedure—diplomatic and consular protection—nationality of claims*

In reply to a question about two women allegedly forced into marriage in the Yemen Arab Republic, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated in part:

Advice to the families is determined by the girls' dual nationality and international convention prevents official intervention when the person concerned is resident in the country of second nationality. That point is clearly stated in the note affixed to all British passports.

(HL Debs., vol. 492, col. 10: 18 January 1988)

On 25 February 1988, the Governments of the UK and Grenada concluded an Agreement concerning the Promotion and Reciprocal Protection of Investments. Article 1 of the Agreement reads in part:

- (c) 'nationals' means:
 - (i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;
 - (ii) in respect of Grenada: physical persons deriving their status as citizens of Grenada from the law in force in Grenada;
- (d) 'companies' means:
 - (i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11;
 - (ii) in respect of Grenada: corporations, firms and associations incorporated or constituted under the law in force in any part of Grenada;
- (e) 'territory' means:
 - (i) in respect of the United Kingdom: Great Britain and Northern Ireland and any territory to which this Agreement is extended in accordance with the provisions of Article 11;
 - (ii) in respect of Grenada: all the territory which constitutes Grenada.

Article 11 reads:

ARTICLE 11

Territorial Extension

At the time of signature of this Agreement, or at any time thereafter, the provisions of the Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes.

(UKTS No. 33 (1988); Cm. 381)

In the course of a debate on the subject of children abducted from the United Kingdom, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Timothy Eggar, stated:

Most children of a marriage between people of different nationalities acquire the nationalities of both parents. In those cases where children have dual nationality and are in the country of their second nationality, as in the case in Sri Lanka, we and our embassies or high commissions are prevented by international law from making formal—I stress formal—representations to the Government of that

country. Such children are viewed as being in their own country and are subject to their own country's law. There is a note to that effect at the back of all British passports.

(HC Debs., vol. 131, col. 530: 15 April 1988)

[*Editorial note*: The note referred to reads:

British nationals who are also nationals of another country cannot be protected by Her Majesty's Representative against the authorities of that country. If, under the law of that country, they are liable for any obligation (such as military service), the fact that they are British nationals does not exempt them from it. A person having some connection with a Commonwealth or foreign country (e.g. by birth, by descent through either parent, by marriage or by residence) may be a national of that country, in addition to being a British national. Acquisition of British nationality or citizenship by foreigner does not necessarily cause the loss of nationality of origin.]

Leaflet BN 15, 'Some Information for British nationals', issued by the Nationality Division of the Home Office, dated April 1987, refers to dual nationality and continues:

British nationality law allows you to retain any other nationality you may already hold. However some other countries do not allow dual nationality. If you were a national of a country which does not allow dual nationality, the authorities of that country may either regard you as having lost that nationality or may refuse to recognise your new nationality status.

Why is this important?

Suppose you have kept the other nationality and you visit the country concerned. International law allows the authorities of that country to treat you while you are there as if that is your only nationality. The British representative there cannot give you assistance or protection against those authorities.

In July 1988, a member of the public wrote to the Foreign and Commonwealth Office asking 'whether the 1987 leaflet in this regard reflects the considered view of Her Majesty's Government as to the position in customary international law'. By a letter dated 5 October 1988, the Foreign and Commonwealth Office (Legal Advisers) replied as follows:

...

2. I think that the starting point in considering the statement on dual nationality which appears in leaflet BN15 is that every state is entitled to determine who its nationals are, and to treat those of its nationals within the jurisdiction who do possess another nationality, in the same way as those of its nationals who do not. A State may, for example, require its nationals to perform military service, to pay taxes etc irrespective of whether or not they have more than one nationality. To that extent, I am sure you will agree that the second sentence of the Statement you have quoted accurately reflects the position in international law.

3. Where the question arises of an international claim by one state against another in respect of a person who is a national of both, several situations must be distinguished. First, a bilateral agreement may exist between the states setting out

their understanding as to the protection of their nationals. Such a statement appears in the UK-China Agreement on Hong Kong of 1985. Secondly, a multi-lateral treaty regime—such as the Hague Convention of 1930—may be in place to which both states are party. Thirdly, regional systems of human rights protection may offer a mechanism for inter-state claims which will not be affected by dual nationality. Finally, there are the rules of customary international law. As to these, I am inclined to agree with you that customary international law does not prevent one state claiming against another on behalf of an individual who is a national of both, in a case where the dominant or effective nationality of the individual is that of the claimant state. In other words, the strict rule in Article 4 of the 1930 Hague Convention has not found general acceptance in state practice.

4. In the light of this, the last sentence of the statement, which you have quoted, could, at the very least be regarded as somewhat simplistic. However, I think it should be read as a general guideline, perhaps even as a warning symptomatic of the kind of attitude which might well be adopted by the State visited and which would, in practice, seriously hamper the efforts of British Consular officials. The statement in question is not, of course, a considered statement of HMG's policy on the taking up of claims of dual nationals which, as you quite rightly indicate, is contained in the 1983 Rules regarding the Taking up of International Claims by HMG. These rules make it clear that HMG's policy is to not take up claims on behalf of British nationals against the authorities of States of which they are also nationals, save in exceptional cases. However, our consular or diplomatic agents may well, depending on the circumstances, use their influence and good offices on behalf of British nationals in difficult cases. I hope you will agree that this is a perfectly tenable position in international law.

(Text provided by the Foreign and Commonwealth Office and Dr W.C. Gilmore)

Part Eleven: II. A. 7. (b). *Responsibility—responsible entities—States—procedure—peaceful settlement*

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

The Foreign Compensation (People's Republic of China) Order 1987 was laid before Parliament on 8 January and is due to enter into operation on 1 March. It provides for the Foreign Compensation Commission to register and evaluate claims by those who satisfy the British nationality requirements of the order in respect of bonds issued or guaranteed by the Chinese authorities before 1 October 1949 and in respect of property or other assets expropriated in China between 1 October 1949 and 1 January 1980. The order also sets out arrangements for the distribution of compensation to successful claimants.

(HC Debs., vol. 128, Written Answers, col. 263: 25 February 1988)

Part Eleven: II. D. 2.. *Responsibility—responsible entities—individuals, including corporations—responsibility of individuals*

(See also Part Four: VII. (Criminal Justice Act 1988, s.134) and Part Eight: II. D. (item of 8 February 1988), above)

The following press release was issued by the Foreign and Commonwealth Office on the occasion of the signing by the UK on 26 October 1988 of the Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.

SIGNATURE OF PROTOCOL TO MONTREAL CONVENTION ON HIJACKING:

BACKGROUND

1. The Montreal Protocol was the initiative of the Canadian Government following the terrorist attacks on Rome and Vienna airports in December 1986. The Canadian Government pointed out that, as existing conventions on hijacking related to attacks on board aircraft or which threatened the safety of aircraft in the air, they did not cover incidents such as those in Rome and Vienna where the attacks were directed against people in the airport terminal. The UK agreed to join the long list of states sponsoring the proposal and played an active part in the ICAO Conference in Montreal from 9–24 February this year at which the Protocol was drawn up. London is one of the depositories for the Protocol.

2. The Montreal Convention was drawn up by ICAO in 1971. It builds on the Hague Convention of the previous year, which provides for signatory states to pass laws making hijacking an aircraft a specific offence subject to heavy penalties; take powers to arrest those suspected of the offence, irrespective of where it was committed; and undertake either to prosecute or extradite the suspects. The Montreal Convention applies the same principles to virtually all activities likely to endanger the safety of an aircraft in service. The Montreal Protocol is a further step: it extends the provisions of the Montreal Convention to cover acts of violence at international airports. It commits states which sign it to make acts of violence at international airports into offences under their own laws and to prosecute or extradite suspects.

3. 47 countries signed the Protocol at the conclusion of the Conference, out of 76 present. Since then there have been a further two signatories in London — Ireland and Jordan.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question, the Minister for Roads and Traffic wrote:

The prevention of acts of unlawful interference with civil aviation, and the development of procedures for dealing with them when they occur, is regarded as a high priority by both the International Civil Aviation Organisation and the European civil aviation conference. Both have developed international standards and guidance material for preventive measures, and they keep these under constant review.

ICAO has sponsored the development of three international conventions (the Tokyo, Hague and Montreal conventions), which together establish an international legal framework making acts of unlawful interference into international offences for which signatory states will either bring suspects in their custody to

justice or permit their extradition to another competent state, and providing for the re-establishment of lawful control in cases where aircraft have been seized.

(HC Debs., vol. 139, Written Answers, col. 412: 27 October 1988)

Part Twelve: II. G. 1. *Pacific settlement of disputes—modes of settlement—arbitration—arbitral tribunals and commissions*

Articles 8 and 9 of the Agreement concerning the Promotion and Reciprocal Protection of Investments, concluded by the Governments of the UK and Grenada on 25 February 1988, read as follows:

ARTICLE 8

Settlement of Disputes between an Investor and a Host State

- (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.
- (2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
 - (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965¹ and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
 - (b) the Court of Arbitration of the International Chamber of Commerce; or
 - (c) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

ARTICLE 9

Disputes between the Contracting Parties

- (1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel.
- (2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

¹ Treaty Series No. 25(1967). Cmnd. 3255.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

(UKTS No. 33 (1988); Cm. 381)

Part Twelve: II. H. 1. *Pacific settlement of disputes—modes of settlement—judicial settlement—the International Court of Justice*

(See also Part Eleven: II. A. 6. (item of 10 November 1988), above)

In the course of a speech in the Sixth Committee of the UN General Assembly on 18 October 1988, the UK representative, Mr A. Aust, considered the report of the Special Committee on the Charter of the UN and on the strengthening of the role of the organization. He remarked in part:

I turn now to the International Court of Justice. Last year the Soviet Union made some interesting points about enhancing the role of the Court. This was said in the context of statements which emphasized the supremacy of international law. Again this year, we have heard similar statements, including one during the debate on the present agenda item. The United Kingdom is particularly interested in the Soviet ideas. We have always been a staunch supporter of the International Court of Justice and have, from the beginning, accepted its compulsory jurisdiction. We are therefore willing to explore any suggestions which would lead to a wider acceptance of the jurisdiction of the Court. In every country where the rule of law is supreme, the role of the judiciary is vitally important. The existence of courts to which disputes can be taken by one or other party is essential. If the rule of law is really to govern relations between States, it is necessary for States to accept the

proper role of the International Court of Justice. Mr Chairman, there are various ways in which this can be achieved.

Firstly, the most obvious way is for States which have not yet done so to accept the compulsory jurisdiction of the Court. We have noted the Soviet Union's suggestion that the Permanent Members should take a lead on this. As the Soviet Union were kind enough to recognise at their press conference last Friday, the United Kingdom is the only Permanent Member which at the moment accepts the compulsory jurisdiction of the Court.

Secondly, a simple and ready manner in which States could enhance the jurisdiction of the International Court of Justice would be by their increased adherence to the optional protocols to multilateral conventions. Many conventions have a protocol under which the parties agree to refer disputes regarding the interpretation and application of the convention to the Court. Since the jurisdiction of the Court in this case is limited by the conventions themselves, parties to them should have less difficulty in adhering to such protocols. If they are willing to be bound by the obligations imposed by the conventions—and enjoy the rights created by them—they should be ready to accept an impartial adjudication of any dispute arising under them.

Thirdly, there are of course many multilateral conventions, though not necessarily of a universal character, which provide for the compulsory jurisdiction of the Court (or mandatory arbitration) of matters arising under them. The United Kingdom is party to numerous conventions and agreements of this kind. It would be a step forward if more conventions of a universal character also contained such provisions.

Fourthly, schemes have been proposed—at various times—whereby States would agree on a multilateral (or perhaps bilateral) basis to accept the compulsory jurisdiction of the Court with certain exceptions, or, the reverse, that they would accept its jurisdiction only for certain subjects. Such suggestions raise difficult questions of what to exclude or what to include. But, given goodwill, there is no reason in principle why such ideas should not be developed successfully.

The United Kingdom believes that this whole subject merits further consideration by all States and is ready and willing to discuss it in any appropriate forum.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/43/SR.16, p. 12)

Part Twelve: II. I. 1. *Pacific settlement of disputes—modes of settlement—settlement within international organizations—the United Nations*

In a speech on 18 October 1988 in the Sixth Committee of the UN General Assembly considering the report of the Special Committee of the Charter of the UN and on the strengthening of the role of the organization, the UK representative, Mr A. Aust, stated in part:

I now turn, Mr Chairman, to the subject of Peaceful Settlement of Disputes between States. Once again, this topic was considered under two heads. First, the Committee discussed the proposal for the establishment of a Commission for Good Offices, Mediation and Conciliation, on the basis of the revised proposal introduced by the sponsor, Romania, at the 1987 session. The subject raises important questions concerning the relationship between the proposed commission and the organs of the United Nations. As we have emphasized on previous occasions, it is

essential that the primary role of the Security Council in seeking peaceful solutions to disputes, the continuation of which is likely to endanger the maintenance of international peace and security, must not be prejudiced in any way. It is also important to ensure that any such commission would not adversely affect the important mediation functions carried out by the Secretary General and his staff. Recent successes of the Secretary General show how important it is that his role should be in no way diminished. Although the revised proposal goes some way towards clarifying the relationship between the proposed commission and existing relevant United Nations organs, several delegations at this year's session of the Special Committee continued to express doubts about the usefulness of establishing such a body, given the existing machinery for peaceful settlement of disputes. It has always been the view of the United Kingdom that the key to effective peaceful settlement of disputes is the willingness of States to employ existing machinery, rather than the construction of new machinery.

(Text provided by the Foreign and Commonwealth Office; see also A/C.6/43/SR.16, pp. 11-12)

Part Twelve: II. I. 2. *Pacific settlement of disputes—modes of settlement—settlement within international organizations—organizations other than the UN*

The following letter, dated 12 February 1987, was sent by the Treasury Solicitor's Department to the Clerk to the Treasury and Civil Service Committee. It is reproduced for general interest.

DISCLOSURE OF PLEADINGS IN CASES BEFORE THE EUROPEAN COURT OF JUSTICE

I agreed to let you have an informal note on the general position with regard to disclosure of pleadings.

Pleadings in cases before the European Court of Justice are addressed to the Court and their purpose is to inform the Court and the other parties of the arguments and contentions of the party submitting the pleadings. It is the Court's responsibility to serve copies of the pleadings thus submitted on the other parties and anyone else entitled to receive them under the rules of the Court (eg a Member State intervening in the proceedings). The internal rules of the Court prohibit disclosure by the Court's staff, except to those who are entitled to receive them. The Court does not publish the pleadings it receives either during or after the hearing of the case, although they will be summarised in the report for the oral hearing which is published shortly before it.* There is nothing in the rules of the Court which regulates the disclosure by parties either of their own pleadings or of the pleadings of others.

As regards the pleadings of other parties, they will have been sent by the Court in order to inform the party concerned of the other side's case and to give him an opportunity to reply to it either in a written pleading or, if the written procedure is at an end, at the oral hearing. They are received for these specific purposes and are, therefore, to be used and disclosed only for the purpose of and to the extent necessary for the proper preparation and conduct of the case. Unless the other party

* Also, in accordance with Article 16(6) of the Court's Rules of Procedure, particulars of applications originating proceedings are summarised in the Official Journal of the European Communities.

authorises disclosure, the confidentiality of his pleadings is to be respected. That is the general reason for treating such pleadings as confidential. More specific reasons for non-disclosure may arise in particular cases. For example the pleadings may well refer to deliberations within the Council which under the Council's rules of procedure are subject to professional secrecy; or to correspondence between the parties or to negotiations with the Commission, which are confidential. Disclosure may prejudice settlement of cases.

There is no general rule against disclosing one's own pleadings. In practice however, there are considerable constraints and disclosure must be considered with great care in each case. Defences and other subsequent pleadings which are in response to those of the other party will almost inevitably disclose the nature of the other party's case and, to that extent, must therefore be subject to the same restraints on disclosure as apply in relation to the pleadings of others. Applications commencing proceedings against a community institution may well give details of the institution's internal proceedings which are confidential to it and cannot be revealed without its consent.

Circumstances can, as you know, arise in which disclosure may be appropriate. The 1986 EEC budget case was an instance in which the view was taken that it would be proper to show the application to Parliament, although only on the basis that it would be seen by Members alone. That application was of course available to the European Parliament as well, since it was the defendant in the proceedings. Such instances will, in my view, be rare.

(Text provided by the Foreign and Commonwealth Office)

Part Thirteen: I. A. Coercion and use of force short of war—unilateral acts—retorsion

The following paragraphs appeared in a letter, dated 2 August 1988, sent to Congressman Udall by the UK Chargé d'Affaires in Washington, Mr B.L. Crowe:

3. I am writing to you now about one other aspect of the draft legislation [Anti-Apartheid Amendments Act, 1988] namely the provision which would deny the issue of leases or permits for exploration or development of oil, gas or coal in the US to any foreign person who has an investment in South Africa or breaches the prohibition on oil transportation. From the UK's point of view, this would be a very serious prohibition which would hit two major British companies (BP and Shell) with inevitable consequences for Anglo-American relations.
4. The award of oil licences in the UK is generally conducted on a discretionary basis. Where a foreign-owned company applies for a licence one of the factors taken into account is the extent to which UK companies are afforded equitable treatment when applying for licences in the foreign country concerned. As you may know, there is a similar reciprocity provision in the US, in the Mineral Leasing Act of 1920.
5. If the US introduced legislation which resulted in BP and Shell no longer receiving equitable treatment when applying for US licences, then the British Government would certainly come under strong domestic pressure to retaliate against US oil companies operating, or wishing to operate, in the UK. Given the very substantial participation of US oil companies in the North Sea as well as the

importance of the North Sea for their operations this is a situation which we very much hope will not arise.

I am sending a copy of this letter to Congressman Young and also to Congressman Huckaby who I understand intends to offer an amendment on this subject.

(Text provided by the Foreign and Commonwealth Office; see also Part Eight: II. D.(item of 12 October 1988), above)

Part Thirteen: I. D. Coercion and use of force short of war—unilateral acts—intervention

In the course of a debate on the subject of annual United Nations endorsement of principles for Cambodia (Kampuchea), the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Timothy Eggar, stated:

The tragedy is that annual endorsement should be necessary, that we should have to say again and again that these basic principles should apply to Cambodia as they apply to the rest of the world. The reason that we have to do that is simple and straightforward and it is Vietnam's completely illegal occupation of Cambodia; indeed, Vietnam's cynical and flagrant disregard for the principles of international law.

(HC Debs., vol. 125, col. 1224: 21 January 1988)

In reply to a question on the subject of an attack by South African armed forces on the offices of the African National Congress in Bulawayo in January 1988, the Minister of State, Foreign and Commonwealth Office, wrote:

So far as we know, the Zimbabwe Government have not claimed that the South African armed forces were involved in the attack. However, we are opposed to cross-border violations in either direction however and wherever they occur. We have consistently urged the South African Government to respect the sovereignty and territorial integrity of their neighbours.

(HC Debs., vol. 126, Written Answers, cols. 640-1: 3 February 1988)

The following statement was issued by the Foreign and Commonwealth Office on 28 March 1988:

The Foreign Secretary has heard with concern of this morning's raid by the [South African Defence Forces] on a suburb of Gaborone. We condemn this latest provocative act by the SADF, which is in flagrant breach of the sovereignty and territorial integrity of Botswana.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate on 21 April 1988 in the UN Security Council, the UK Permanent Representative to the UN, Sir Crispin Tickell, stated:

In October 1985 the Palestine Liberation Organisation in Tunisia was the target of an attack which constituted a grave affront to Tunisian sovereignty.

(S/PV. 2807, pp. 48-50)

In reply to a question on the subject of a raid into Botswana by South

African security forces on 28 March 1988, the Minister of State, Foreign and Commonwealth Office, wrote:

We issued a statement on 28 March condemning the raid. I asked the South African ambassador to call on 29 March and delivered our very strong protest. On 31 March the German ambassador in Cape Town gave a similar message to the South African Government on behalf of the 12 member states of the European Community.

...
We have condemned South Africa's use of force in its relations with Botswana and its other neighbours. We shall continue to urge the South Africans to exercise restraint and to co-operate peacefully with their neighbours.

(HC Debs., vol. 132, Written Answers, col. 155: 27 April 1988)

On 10 May 1988, the UK representative, Mr J. Birch, stated during a debate in the UN Security Council:

There is now a 10-year history of destructive intervention by Israeli forces in Lebanon and occupation by Israel of a part of Lebanese territory. There is equally a history of armed attacks mounted from Lebanese territory against Israel. This Council, given its responsibility for the maintenance of international peace and security, cannot ignore them. Both forms of attack are unacceptable; both undermine the stability of the area; both make more difficult the achievement of the peace and security which Israel, as well as Lebanon, has the right to expect. But not only is the recent Israeli action a violation of Lebanese sovereignty; it is also a disproportionate response. Far from providing a solution to the problem we all recognize, it makes the solution all the more difficult. We continue to urge Israel to complete its withdrawal from southern Lebanon and to allow the United Nations Interim Force in Lebanon to deploy its forces to the international border, in accordance with Security Council resolution 425 (1978).

(S/PV. 2814, p. 57)

At a press conference held by the Foreign and Commonwealth Office on 7 September 1988, a spokesman stated:

... we had seen reports of deep intrusions into Pakistan's air space by Kabul regime military aircraft and of attacks by them on villages causing civilian deaths and injuries and severe damage. If these reports were confirmed, we could only condemn the brutal and blatant violation of international law and of Pakistan's territorial integrity.

(Text provided by the Foreign and Commonwealth Office)

In a speech to the UN General Assembly on 17 November 1988, the UK Permanent Representative to the UN, Sir Crispin Tickell, referred to the Falkland Islanders and continued:

Six years ago their powerful neighbour, in breach of international law and the Charter of the United Nations, invaded and occupied the Islands.

(A/43/PV.54, p. 31)

Part Fourteen: I. B. 4. *Armed conflicts—international war—the laws of war—sea warfare*

(See Part Fourteen: III. (item of 12 April 1988), below)

Part Fourteen: I. B. 7. *Armed conflicts—international war—the laws of war—humanitarian law*

(See also Part Fourteen: I. B. 8. and I. B. 10. (item of 30 March 1988), below)

In the course of a debate in a House of Commons Standing Committee on the subject of the Arms Control and Disarmament Bill, the Minister of State, Foreign and Commonwealth Office, Mr David Mellor, stated:

. . . the four Geneva conventions of 1949 deal with the laws of war and cover the protection of the sick, the wounded and civilians and the treatment of prisoners of war. The United Kingdom and the majority of other states are parties to those conventions. As the hon. Gentleman pointed out in moving the amendment, two additional protocols were drawn up in 1977 after a protracted diplomatic conference. The aim of those additional protocols was to supplement and update conventions on such matters as the protection of civilians and the environment in wartime. Protocol 1 deals with international conflicts and protocol 2 with civil wars and rebellions. Overall, the protocols mark a valuable advance in humanitarian law applicable to armed conflicts.

. . . the additional protocols deal with general humanitarian rules, not with any specific weapons. The banning or limiting of weapons is for disarmament negotiations of the kind that we have already considered. The protocols entail new commitments. Our policy is not to become a party to binding legal instruments until we are sure that they do not conflict with other obligations. We must also be sure that we can meet the new commitments in full.

It is essential to consider all the implications of the protocols, both nationally and with our allies. In a sense that is the answer to some of the hon. Gentleman's questions, for example about the Iran–Iraq conflict. That may reveal clearly that the key point in international relations is not that people sign international agreements, but that they abide by them. We are not willing to sign any international agreement when there is any doubt in our minds about whether we can comply in every material particular.

In the context of the NATO Alliance, it is important that there should be the greatest possible measure of common approach among the allies, particularly at the level of practical implementation which is the real test of these obligations.

We must recall that NATO has an integrated command structure and we must ensure, for example, that a British officer under Allied command is not ordered to do something which the ally may legally do because the ally is not a party to certain arrangements, but which our soldiers may not. That is why we feel the need to give this careful consideration. That was the view of our predecessors who signed the protocol, but did not ratify it, and who, indeed, submitted a statement of understanding in 1977 to the effect that 'The new rules . . . are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons'.

. . .

The position on the NATO Alliance is that some countries will ratify the protocols and some will not. Belgium, Denmark, Iceland, Italy, the Netherlands and Norway have ratified them. France has acceded to protocol 2, but has announced that it does not intend to accede to protocol 1. The United States announced to the Senate that it wished the Senate to approve ratification of protocol 2, but not protocol 1. Some countries have not yet reached final agreement.

Clearly, careful thought is still required. However, the Government appreciated that such thought cannot go on for ever and we are intent on reaching a conclusion within the timescale set out by my noble Friend. We are playing a leading role in the discussions on how a common approach might be achieved. But, NATO is an alliance of democracies and, inevitably, such consultations take time.

We must not forget the direct implications for the Bill. Verification as such is not provided for in the protocols. Therefore, even if we ratified them, it is not clear whether the Bill will have any relevance to what will ensue. There seems little doubt that legislation would be required to implement certain provisions of protocol 1, if we ratified that. Indeed, primary legislation was required for the original Geneva conventions. For example, article 90 of protocol 1 provides for an international fact-finding commission to investigate violations of the protocol or of the conventions. That will enter into force only when 20 states party make declarations recognising the competence of the commission. So far only nine states—all European—have done so out of the 70 states party. We have not yet decided our position on the commission or whether the facilities for its members require primary legislation. . . . I think that it is unlikely that the Bill will provide a vehicle for ratification were we minded to ratify one or both of the protocols.

(HC Standing Committee D, Arms Control and Disarmament Bill, cols. 113–14: 12 November 1987)

Part Fourteen: I. B. 8. *Armed conflicts—international war—the laws of war—belligerent occupation*

In the course of a debate in the House of Commons on the subject of events in the West Bank and Gaza, reference was made to an Israeli proposal to deport Palestinians from these areas. The Minister of State, Foreign and Commonwealth Office, Mr David Mellor, stated:

My hon. Friend is unquestionably right to condemn the deportations. They are illegal under international law, and, what is more, they are counter-productive in their practical effect. They will only create martyrs and make a difficult situation even worse. I hope that the Government of Israel will pay heed to what the United Nations has asked and suspend the policy of deportations.

(HC Debs., vol. 125, col. 19: 11 January 1988; see also HL Debs., vol. 491, col. 1228: 13 January 1988)

On 1 February 1988, in the UN Security Council, the UK Permanent Representative to the UN, Sir Crispin Tickell, stated:

. . . we endorse the call for Israel to abide by its obligations under the Fourth Geneva Convention and to ensure that its practices as the occupying Power conform to them. There is no doubt that the Convention applies in full to the occupied territories. We see no merit in Israeli arguments to the contrary. As a High

Contracting Party to the Convention, we shall continue to do all in our power to persuade the Government of Israel in this sense.

(S/PV. 2790, p. 36)

In the course of answering questions on the subject of the Gaza Strip, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

I agree that what has understandably intensified world concern about the Arab-Israel dispute is the position not only in Gaza but elsewhere in the occupied territories. There can be no doubt that Israel should withdraw, as part of a comprehensive peace settlement, from the territories occupied in 1967; and that, meanwhile, she should administer the occupation of those territories in compliance with international law and human rights standards.

There is a stark contrast between the conditions of those who live in refugee camps and, for example, the Israeli settlers, who live in illegal occupation of the land alongside them. The presence of Israel in such territories is contrary to international law, as resolution after resolution of the United Nations have recognised.

If the existing settlements are an infringement of international law, by the same token the extension of such settlements is a still further infringement. More than that, they cannot help to advance or consolidate the cause of peace. They seek to entrench the occupation of illegally occupied territory. They act as a challenge to violence in the opposite direction, which itself poses a threat to the state and people of Israel. It is because of my passionate belief in the right of Israel and its people to exist as a state within secure borders that I urge the people of Israel and their leaders to recognise the need to turn from the path of the entrenchment of illegality and to embark upon the process of negotiation that is so important.

(HC Debs., vol. 126, cols. 960–2, *passim*: 3 February 1988; see also HC Debs., vol. 128, Written Answers, col. 594: 2 March 1988, HL Debs., vol. 496, col. 371: 3 May 1988, and HC Debs., vol. 136, Written Answers, col. 604: 6 July 1988)

In reply to a question on the subject of 'the breach of international law involved in the deportation of Palestinians from the occupied territories to the Lebanon', the Minister of State, Foreign and Commonwealth Office, wrote:

We have already made representations to the Israelis bilaterally and together with our partners in the Twelve. We voted for United Nations Security Council resolutions 607 and 608 which called on Israel to refrain from deporting Palestinian civilians and to ensure the safe return of those already deported.

(HC Debs., vol. 126, Written Answers, col. 641: 3 February 1988)

In a speech in the UN Commission on Human Rights on 4 February 1988, the UK representative, Mr. H. Steel, stated:

The problem of the Occupied Territories is one which rightly engages the concern of the whole international community. The Government of the United

Kingdom regards it as a problem of the highest importance and urgency. The duty of the United Nations to help the parties find a just and lasting solution to that problem becomes more imperative with every day that passes.

There are, however, many facets of the problem, and it is sometimes necessary to distinguish clearly between them. The problem as a whole can most effectively be dealt with—and a solution to it can most effectively be achieved—if each of the competent organs of the United Nations focuses its attention and its efforts on that facet which is its special concern and to which its own mechanisms are most appropriate. In the case of this Commission, the facet which concerns us is, of course, the undeniable violations of the human rights of the inhabitants of the Occupied Territories. That is what demands our concentrated attention in the debate on which we are now engaged and it is that to which our words and our actions, in the form of any resolutions or decisions which emerge from this Commission, should be entirely directed. In this intervention, therefore, I shall not follow other speakers who have thought it right to express views and positions on wider aspects of the problem of the Occupied Territories. The United Kingdom Government is acutely concerned with those wider aspects. But they are best dealt with—and they are in fact being dealt with—in other ways and by other organs of the United Nations. Our remit in this Commission is the violation of human rights: and it is on the violation of human rights that we must now focus our attention.

The United Kingdom Government is in no doubt, and we do not see how any objective and fair-minded observer of the current situation can be in any doubt, that the human rights of the inhabitants of the Occupied Territories are indeed being repeatedly infringed. It gives my delegation no satisfaction—quite the reverse—to have to level at the Government of Israel the criticism in this regard that we now find ourselves obliged to make. The United Kingdom regards itself as a friend of Israel and a firm supporter of its right, together with all States within the region, to secure existence within recognised borders, simultaneously with provision for the legitimate rights of the Palestinian people, including their right to self-determination. But it is precisely in our capacity as a friend of Israel that we now speak on this matter.

As others have said, the mischief from which all the current problems spring is the continued occupation itself, now more than 20 years old. My Government has frequently made clear its views on the necessity for that occupation to be speedily brought to an end in accordance with the relevant resolutions of the Security Council. But so long as the occupation persists, the Government of Israel is under both a legal and a moral duty to respect, scrupulously, the human rights of the inhabitants. Specifically, the occupying authorities must apply all the provisions of the relevant international instruments in this field. In company with all the other Members of the European Community, the United Kingdom Government is firmly of the opinion that Israel is bound to apply in the Occupied Territories all the appropriate provisions of the Fourth Hague Convention of 1907 and the Fourth Geneva Convention of 1949 relating to the Protection of Civilian Persons in Time of War. We have heard and considered the arguments to the contrary that have been advanced from time to time on behalf of the Government of Israel. We must say, with respect but firmly and frankly, that we consider that they are without merit.

In relation to the application of those Conventions the United Kingdom Government remains seriously concerned about the Israeli policy of financing and

encouraging settlement in the Occupied Territories. That policy constitutes a contravention of article 49 of the Fourth Geneva Convention. In short, it is illegal. Every new settlement, and the maintenance of every existing settlement, is a violation of international law and, what is of particular concern to us in this Commission, it is a violation of the human rights of the population of the Occupied Territories. We call upon the Israeli Government, in the very appropriate language of American law, to 'cease and desist'.

What I have just referred to, and condemned, is what may be described as a violation in the Occupied Territories of the human rights of its population as a whole. No less of concern to the United Kingdom Government and to this Commission is the repeated violation of the human rights of individual members of that population. Speaking, as I have said, as the representative of a country which regards itself as a friend of Israel, the list of such violations is a painful one to enumerate. It includes such totally unacceptable measures as collective punishments, harsh travel restrictions and administrative detention. Violations such as these must be firmly condemned. More to the point, they must be brought to an end. We are especially exercised about the deportation of Palestinians from the Occupied Territories. The concern of the international community has been made clear in Security Council Resolutions 607 and 608, resolutions which my Government supported. We urge the Government of Israel to comply with those resolutions and, even more urgently, to carry out no further deportations.

These violations which I have cited are, unfortunately, not just a recent phenomenon, nor is this the first occasion on which my Government has expressed its grave concern about them. But, as we all know, the events of the last few weeks have given them a special and bitter topicality. What is more, they have brought before us a particularly disturbing element. I refer, of course, to the indefensibly violent response of the Israeli security forces to recent demonstrations and protests and the sometimes brutal methods which have been employed to deal with them. It cannot be too strongly affirmed that it is the legal obligation of the Government of Israel—and of course its moral obligation is no less—to exercise its responsibilities in the Occupied Territories in a humane manner. My Government, both individually and in concert with the other Members of the European Community—for example, in a *démarche* made by the Danish Presidency on behalf of the twelve Member States on 18 December of last year—has vigorously represented to the Israeli Government its unhappiness with the extent to which, as we see it, Israel has fallen short of a full discharge of this basic obligation. Indeed, we have seen examples of conduct by the Israeli security forces which, it must be said, scarcely conform with civilised standards.

...

I go back to the central issue before us, that is to say, the human rights of the inhabitants of the Occupied Territories and the violation of those human rights. On that issue a clear and unequivocal message should go forth from this Commission to the Government of Israel. If it is to have the necessary authority behind it, it should be a message which all of us here can support. Its thrust must therefore not be diverted, and its impact must not be diluted or undercut, by the introduction of matters not strictly within our province as the Commission on Human Rights. For the same reason, it must be couched in measured and sober language to which we can all subscribe. It must say to the Government of Israel that the

violations of human rights which have taken place, and are still taking place, in the Occupied Territories are not acceptable to the international community and that they must cease.

It is the earnest desire of the United Kingdom Government that, at the end of these discussions, we may jointly bend our efforts to the evolution and enunciation of such a message. That is a task in which my delegation is prepared to cooperate willingly and in good faith.

(Text provided by the Foreign and Commonwealth Office; see also E/CN.4/1988/SR.6, pp. 13-15)

The following reply to a question was given at a press conference held by the Foreign and Commonwealth Office on 12 April 1988:

Spokesman said we unreservedly deplored the deportation of eight Palestinians from Occupied Territories to the Lebanon by the Israeli authorities and the threat that twelve more would follow.

Our opposition to the policy of deportation is clearly on the record. This action by the Israelis is in clear defiance of the will of the overwhelming majority of the international community (UN Security Council Resolutions 607 and 608: January 1988).

These deportations are a clear breach of international law. They will serve further to increase bitterness in the Occupied Territories and make the continuing search for a solution ever more difficult.

(Text provided by the Foreign and Commonwealth Office)

During a debate in the Security Council, the UK representative, Mr J. Birch, stated on 15 April 1988:

The provocative and often lethal actions of armed settlers in the occupied territories against the inhabitants have drawn increasing attention. Collective punishments, including the demolition of houses, have become more common. Deportations in disregard of this council's resolutions 607 (1988) and 608 (1988) have again taken place, and more are envisaged. Arbitrary economic measures have been taken against the population, causing hardship and suffering.

This Council has long pointed out that such measures on the part of the occupying authorities are unacceptable. They are more; they are immoral, illegal and politically self-defeating. The purpose of the Fourth Geneva Convention of 1949 was to spare the world such abuses and such degradation to both occupied and occupier alike.

(S/PV. 2806, pp. 49-50)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We regularly urge Israel to administer the occupied territories in accordance with international law and human rights standards. We particularly deplore the use of live ammunition, deportations and collective punishments, and other excessive measures of repression.

(HC Debs., vol. 132, Written Answers, col. 461: 4 May 1988)

In the course of a debate on the subject of the Middle East, the Minister

of State, Foreign and Commonwealth Office, Mr William Waldegrave, stated:

Although those improvements in economic conditions are important, they will not reduce the deep despair and frustration of Palestinians in the occupied territories, which led to the present disturbances. No one doubts that the stifling of economic activity, to protect Israeli industry, and the innumerable restrictions and petty humiliations—which my hon. Friend the Member for Bournemouth, East said were being inflicted on people who are regarded as second class; in short, the occupation itself—provoked the inevitable reaction. We do not believe that the uprising was organised from the outside, and the extent of outside influence should not be exaggerated. It was a spontaneous and inevitable upsurge of protest against the occupation. Its momentum is maintained primarily by young people in the occupied territories. This problem has been compounded by Israeli tactics, such as excessive use of force by soldiers who are not trained for such tasks and deportations and collective punishment contrary to international law. We surely all condemn such measures.

We acknowledge Israel's responsibility, pending its withdrawal, to maintain order in the occupied territories, but the responsibility must be discharged in accordance with international law and human rights standards. The Geneva convention applies to the occupied territories, and Israel should observe its provisions. (HC Debs., vol. 138, col. 808: 29 July 1988)

At a press conference held by the Foreign and Commonwealth Office on 7 September 1988, a spokesman stated:

... we had noted reports of the arrests of Palestinians in the West Bank. The Israelis were well aware of our views; that they should fulfil scrupulously their obligations under international law in the exercise of their responsibilities as the occupying power.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate on the subject of Israeli activities in the occupied territories, the Minister of State, Mr William Waldegrave, said:

I recently protested to the retiring Israeli ambassador, Mr Avner, about the use of plastic bullets. I think that my hon. Friend understands that these are not baton rounds but plastic bullets fired by high explosive charges. We registered a protest, as did the United States Government, about the casualties caused by those plastic bullets. The Israeli Government know very well that Her Majesty's Government believe that they are sleep walking to disaster by their treatment of the people in the occupied territories.

(HC Debs., vol. 138, col. 876: 19 October 1988; see also *ibid.*, vol. 142, Written Answers, col. 303: 30 November 1988)

In the course of a debate in the House of Lords on the subject of Gaza and the West Bank, the Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated:

Our view is clear. Pending its withdrawal as part of a comprehensive settlement in accordance with Security Council Resolution No. 242, Israel has a duty to

administer the occupied territories in accordance with international law and human rights standards.

We agree of course that Israel has the right, indeed the responsibility, to ensure public order and safety in the occupied territories. Article 43 of the 1907 Hague regulations states this unambiguously; but there are limits. The maintenance of public order cannot justify the use of excessive force, including live ammunition and plastic bullets fired at close range and beatings of unarmed persons. The figures I have already quoted testify to the results of these policies. But they have not weakened Palestinian resolve; rather, every funeral strengthens it.

We, like the great majority of the international community, maintain that the fourth Geneva convention relative to the protection of civilian persons in time of war of 12th August 1949 applies to the occupied territories. There is no substance in Israeli claims to the contrary. In our view the deportation of Palestinians from the occupied territories—32 so far this year—contravenes Article 49 of the fourth Geneva convention . . . This policy has been widely condemned, most notably in Resolutions 607 and 608 passed by the United Nations Security Council earlier this year. Population transfer, whatever the numbers involved, is unacceptable.

Collective punishments, too, such as the demolition of houses . . . are prohibited not only by Article 50 of the 1907 Hague regulations but also by Article 33 of the fourth Geneva convention. They conflict, sadly, with Israel's proud traditions of justice and observance of the rule of law. They only add to the sum of Palestinian grievances. Israeli apologists sometimes argue that these punishments are provided for in regulations surviving from the British Mandate. Let me take this opportunity to make clear . . . that such is not the view of Her Majesty's Government. As a result of the Palestinian (Revocations) Order In Council 1948, the Palestine (Defence) Order In Council 1937, and the Defence Regulations made under it, have not been in force, as a matter of English law, since the making of the 1948 revocation order. If the Israelis now seek to apply the same or similar regulations, that is their decision for which they must take responsibility.

I can confirm . . . that schools and universities in the occupied territories have been closed by the Israelis on security grounds. We and our European partners have made representations to the Israelis but have been unable to convince them to take a different view of their security problems. . . .

We have repeatedly raised with the Israelis these and other breaches of the fourth Geneva convention. The Twelve approached the Israelis earlier this year about deportations; there have been no more deportations since our *démarche* on 18th August. My honorable friend the Minister of State raised the use of plastic bullets with the Israeli ambassador in September and the Twelve followed up in Jerusalem in October. We have also taken up a number of individual cases in some of which the action we sought has subsequently been taken. The Foreign Minister of Greece, speaking on behalf of the Twelve in this week's General Assembly debate on Palestine in Geneva, called once again on Israel to respect the Convention. The Israelis can therefore be in no doubt of our views on this matter. We shall of course be ready to take up with them further breaches of the Convention.

The noble Lord, Lord Mayhew, suggested a new body to monitor Israeli breaches of the Convention. We and our partners in the Twelve already work together to monitor Israeli practices in the occupied territories and take up specific cases as appropriate. Therefore, while I hear what the noble Lord says, I have to say that we do not consider that additional machinery is needed. Nor do we think

that cancellation of the EC's agreements with Israel, which are similar to those the EC has with other Mediterranean states, would help to secure Israeli compliance with the Convention. Economic sanctions are not the answer to the complex problems of the Middle East.

(HL Debs., vol. 502, cols. 1113-4: 15 December 1988)

Part Fourteen: I. B. 10. *Armed conflicts—international war—the laws of war—nuclear, bacteriological and chemical weapons*

(See also Part Fourteen: I. B. 7., above)

At a press conference held by the Foreign and Commonwealth Office on 23 March 1988, a spokesman said that Her Majesty's Government 'strongly condemned the use of chemical weapons anywhere and called for the complete cessation of the use of any such weapons, which was in violation of the Geneva Protocol of 1925'.

(Text provided by the Foreign and Commonwealth Office)

At a press conference held on 30 March 1988, the spokesman referred to the Iraqi use of chemical weapons against the civilian population of the town of Halabja and continued:

This represents a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The UK condemns unreservedly this and all other uses of chemical weapons.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question on the subject of Ethiopia, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We have no evidence that the Ethiopian Army intends to use such weapons. The United Kingdom unreservedly condemns the use of chemical weapons anywhere.

(HC Debs., vol. 132, Written Answers, col. 232: 28 April 1988)

In reply to a question, the Parliamentary Under-Secretary of State for Defence Procurement wrote in part:

Under the terms of the United States/United Kingdom 'Agreement for Co-operation in the Uses of Atomic Energy for Mutual Defence Purposes of 1958' (Cmnd. 537 (as amended)), United States consent is required for the transfer by the United Kingdom to a third party of information and technology covered by that agreement.

(HC Debs., vol. 136, Written Answers, cols. 529-30: 5 July 1988)

At a press conference held on 2 September 1988, the spokesman referred to reports of Iraqi military activity against the Kurds. He continued:

The British Government's position on the use of chemical weapons was of course well known to the Iraqis. We condemned any breach of the 1925 Protocol.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate on the subject of Kurdish human rights, the

Minister of State, Foreign and Commonwealth Office, Lord Glenarthur, stated:

. . . of course we utterly condemn the use of chemical warfare from whatever source. It is a major threat to international security. We condemned chemical warfare by Iran and Iraq in the Iran-Iraq conflict, especially by Iraq against Iranian civilians. The Foreign Office issued a statement about all that on 2nd September. We made clear our views to the Iraqi Ambassador on 6th and 8th October, as did my right honourable and learned friend the Foreign Secretary to the Iraqi Minister of State for Foreign Affairs on 21st September. We have also joined in the United Nations' call for an authoritative independent investigation into chemical warfare by Iraq.

(HL Debs., vol. 501, col. 5: 31 October 1988; see also HC Debs., vol. 140, Written Answers, cols. 268-9: 10 November 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We are party to both the 1925 Geneva protocol which prohibits the use in war of chemical and biological weapons, and the 1972 biological weapons convention which prohibits the development, production and stockpiling of biological and toxin weapons.

(HC Debs., vol. 140, Written Answers, col. 205: 9 November 1988)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The 1963 partial test ban treaty does not require the parties to it to set a date for the ending of all nuclear tests. The parties to the treaty state as their principal aim the speediest possible achievement of an agreement on general and complete disarmament. The cessation of nuclear testing is clearly linked with this. For as long as we rely for our security on deterrence based in part on the possession of nuclear weapons we will need to test them at a minimum level. The cessation of nuclear testing, therefore, remains a long-term goal.

(HC Debs., vol. 143, Written Answers, col. 317: 8 December 1988)

Part Fourteen: I. B. 12. *Armed conflicts—international war—the laws of war—termination of war, treaties of peace, termination of hostilities*

(See Part Eleven: II. A. 6. (material on the subject of the Treaty of Peace with Japan), above)

Part Fourteen: III. *Armed conflicts—self-defence*

(See also Part Nine: IX. (item of February 1987), above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Under article 51 of the United Nations charter, a state actively engaged in armed conflict, such as Iran, is entitled in exercise of its inherent right of self-defence to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicions prove to be unfounded and if

the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay.

(HC Debs., vol. 127, Written Answers, col. 424: 15 February 1988)

In the course of a speech on 17 March 1988 in the UN Security Council on the subject of the Falkland Islands, the UK Permanent Representative to the UN, Sir Crispin Tickell, stated:

At the beginning of 1982, that is to say following the events of 1977 to which the Minister referred, the British and Argentine Governments were engaged in discussions about the Falkland Islands. The islands themselves were guarded—if that is the right word—by less than 50 lightly-armed soldiers. On 2 April 1982 the islands were suddenly invaded by over 10,000 Argentine troops.

The Security Council adopted resolution 502 (1982), a mandatory resolution, which demanded the immediate withdrawal of all Argentine forces from the islands. The Argentine Government, in breach of its obligations under the Charter, ignored it. In consequence my Government exercised its inherent right to self-defence enshrined in Article 51 of the Charter, and at distressing cost to human life—British and Argentine—expelled the invaders. We are determined that no such catastrophe should happen again. Indeed we should be in dereliction of our duty under Article 73 of the Charter were we not to take the necessary steps to safeguard the security of the people of the islands.

(S/PV. 2800, pp. 14–16)

In a memorandum dated 12 April 1988 prepared by the Middle East Department of the Foreign and Commonwealth Office for the Foreign Affairs Committee of the House of Commons examining UK policy towards the Iran/Iraq conflict the following paragraph appeared:

UK Policy on belligerency

12. The UK upholds the principle of freedom of navigation on the high seas, and condemns all violations of the law of armed conflict including attacks on merchant shipping. Under Article 51 of the UN Charter, a state actively engaged in armed conflict (as in the case of Iran and Iraq) is entitled in exercise of its inherent right of self-defence to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicion proves to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay. This right would not however extend to the imposition of a maritime blockade or other forms of economic warfare.

(*Parliamentary Papers*, 1987–8, HC, Paper 179-II, p. 120)

In giving oral evidence to the above Committee on 20 April 1988, the Minister of State, Foreign and Commonwealth Office, Mr David Mellor, said:

What is clear is that the Iranians are put on notice that if they persist in mining international sea lanes in a way which causes damage certainly to United States interests, they must expect a measured and proportionate response, relying on the

right of any sovereign state to take actions in self-defence under Article 51 of the United Nations Charter.

(Ibid., p. 124)

During a debate on the subject of the Middle East, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

But, in the light of the very concern expressed by the right hon. Gentleman about the continuation of the conflict, it is equally right to accept the general right of foreign naval forces present in the Gulf upholding the freedom of navigation, under article 51 of the charter, to defend themselves. The statement clearly reaffirmed—I hope that the right hon. Gentleman does not doubt this—the legitimacy as a matter of principle of action taken in self-defence.

(HC Debs., vol. 136, col. 1046: 6 July 1988)

In the course of a debate on 15 July 1988 in the UN Security Council on the subject of the destruction of an Iranian airliner by US military action in the Gulf, the UK representative, Mr J. Birch, stated:

Despite resolution 598 (1987), fighting has continued between Iran and Iraq, with frequent attacks, contrary to international law, on merchant shipping in international waters.

My country, like others represented around this table, has continued to exercise its right to protect its shipping in international waters against such attacks. The role of our own naval forces in the Gulf is strictly non-confrontational, and is confined wholly to protection. It is entirely appropriate for any such forces to exercise the right to self-defence confirmed by Article 51 of the Charter. In common with all Member States, our concern is to uphold international law and the principle of freedom of navigation.

(S/PV. 2819, p. 6)

Part Fifteen: I. A. *Neutrality, non-belligerency—legal nature of neutrality—land warfare*

In reply to a question on the subject of the supply of military equipment to Morocco ‘in light of Her Majesty’s neutrality in western Sahara’, the Minister of State, Foreign and Commonwealth Office, wrote:

Our policy of strict impartiality over the western Sahara does not preclude the sale of conventional military equipment to friendly Governments in the region.

(HC Debs., vol. 131, Written Answers, col. 33: 12 April 1988)

Part Fifteen: I. B. *Neutrality, non-belligerency—legal nature of neutrality—sea warfare*

In the course of replying to a question on the subject of Iraqi attacks on British-registered vessels in the Gulf, the Minister of State for the Armed Forces wrote in part:

. . . Iraq has consistently claimed the right, in defiance of international law, to attack any shipping helping to sustain Iranian economic activity.

(HC Debs., vol. 137, Written Answers, col. 864: 22 July 1989)

APPENDICES

I. MULTILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1988¹

<i>Title</i>	<i>Place and Date</i>	<i>UK Signature</i>	<i>Text²</i>
Protocol of Amendment to the International Convention on the Harmonized Commodity Description and Coding System, Brussels, 14.6.1983	Brussels, 24.6.1986	22.9.1987 (ratification)	Misc. No. 4 (1987) (Cm. 109)
International Natural Rubber Agreement, 1987	Geneva, 20.3.1987	18.12.1987	Misc. No. 9 (1988) (Cm. 468)
Amendments to the Agreement of 8.4.1959 establishing the Inter-American Development Bank and to the General Rules governing Admission of Non-regional Countries to Membership of the Bank [Resolution AG-8/87]	Washington, 24.12.1987	31.12.1988 (entry into force)	TS No. 32 (1988) (Cm. 377)
Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23.9.1971	Montreal, 24.2.1988	26.10.1988	Misc. No. 6 (1988) (Cm. 378)
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation	Rome, 10.3.1988	22.9.1988	

¹ Information supplied by the Foreign and Commonwealth Office. The table includes some agreements signed by the United Kingdom before 1988, where information was not previously available. The information is correct as at January 1989, although in some cases information available since that time has been included.

² Publication is in various series of UK Command Papers, namely: Misc.=Miscellaneous Series; TS=Treaty Series; Cm.=Command Paper number.

<i>Title</i>	<i>Place and Date</i>	<i>UK Signature</i>	<i>Text</i>
Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf	Rome, 10.3.1988	22.9.1988	
Agreement among the Government of the United States of America, Governments of Member States of the European Space Agency, the Government of Japan and the Government of Canada on Co-operation in the Detailed Design, Development, Operation and Utilization of the Permanently Manned Civil Space Station	Washington, 29.9.1988	29.9.1988	
Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes	Sofia, 31.10.1988	1.11.1988	
Protocol for the Accession of the Portuguese Republic and the Kingdom of Spain to the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, signed at Brussels on 17.3.1948, as amended by the Protocol Modifying and Completing the Brussels Treaty, signed at Paris on 23.10.1954 (with Exchange of Letters)	London, 14.11.1988	14.11.1988	Misc. No. 4 (1989) (Cm. 575)
Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	Vienna, 19.12.1988	20.12.1988	

II. BILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1988¹

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text²</i>
AUSTRALIA		
Treaty concerning the Investigation of Drug Trafficking and Confiscation of the Proceeds of Drug Trafficking	Canberra, 3.8.1988	Australia No. 1 (1988) (Cm. 503)
Exchange of Notes further amending the Agreement on Air Services signed at London on 7.2.1958	Canberra, 4/23.8.1988	TS No. 8 (1989) (Cm. 661)
BAHAMAS		
Agreement concerning the Investigation of Drug Trafficking and Confiscation of the Proceeds of Drug Trafficking	Nassau, 28.6.1988	Bahamas No. 1 (1988) (Cm. 475)
BELGIUM		
Exchange of Notes concerning termination of the Exchange of Notes between the Government of the UK and the Government of the USSR concerning Deep Seabed Mining Areas, and the Agreement between the Governments of Canada, the Kingdom of Belgium, the Republic of Italy, the Kingdom of the Netherlands and the USSR on the Resolution of Practical Problems with respect to Deep Seabed Mining Areas signed at New York on 14.8.1987	Brussels, 14.8.1987	TS No. 34 (1988) (Cm. 383), p. 17
BELIZE		
Exchange of Notes amending the Public Officers' Pensions (Belize) Agreement 1981 signed at Belmopan on 29.9.1981	Belmopan, 17.7.1987/28.3.1988	TS No. 54 (1988) (Cm. 462)
BOLIVIA		
Agreement for the Promotion and Protection of Investments	La Paz, 24.5.1988	

¹ Information supplied by the Foreign and Commonwealth Office. The table includes some agreements signed by the United Kingdom before 1988, where information was not previously available. The information is correct as at January 1989, although in some cases information available since that time has been included.

² Publication is in various series of UK Command Papers, including Treaty Series (TS). Cm.=Command Paper number.

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
BRAZIL		
Exchange of Notes concerning Co-operation in Preventing and Suppressing Illicit Cultivation, Production, Distribution and the Improper Use of Narcotics and Psychotropic Substances (The UK/ Brazil Drugs Agreement 1988)	Brasilia, 8.11.1988	
CANADA		
Exchange of Notes concerning termination of the Exchange of Notes between the Government of the UK and the Government of the USSR concerning Deep Seabed Mining Areas, and the Agreement between the Governments of Canada, the Kingdom of Belgium, the Republic of Italy, the Kingdom of the Netherlands and the USSR on the Resolution of Practical Problems with respect to Deep Seabed Mining Areas signed at New York on 14.8.1987	Ottawa, 14.8.1987	TS No. 34 (1988) (Cm. 383), p. 17
Agreement concerning Air Services Treaty on Mutual Assistance in Criminal Matters (Drug Trafficking)	Ottawa, 22.6.1988 Ottawa, 22.6.1988	
ECUADOR		
Exchange of Notes concerning Certain Commercial Debts (The UK/Ecuador Debt Agreement No. 3 (1988))	London, 4/8.8.1988	TS No. 72 (1988) (Cm. 514)
EGYPT		
Exchange of Notes concerning Certain Commercial Debts (The UK/Egypt Debt Agreement No. 1 (1988))	Cairo, 3.6.1988	TS No. 56 (1988) (Cm. 464)
FRANCE		
Agreement relating to the Delimitation of the Territorial Sea in the Straits of Dover	Paris, 2.11.1988	France No. 1 (1989) (Cm. 557)
GABON		
Exchange of Notes concerning Certain Commercial Debts (The UK/Republic of Gabon Debt Agreement No. 2 (1988))	Libreville, 22.9/12.10.1988	
GRENADA		
Agreement for the Promotion and Protection of Investments	London, 25.2.1988	TS No. 33 (1988) (Cm. 381)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
GUINEA Exchange of Notes concerning Certain Commercial Debts (The UK/Guinea Debt Agreement No. 2 (1986))	Dakar, 26.2/13.10.1988	
INDIA Exchange of Notes further amending the Agreement for Air Services between and beyond their respective Territories, signed at New Delhi on 1.12.1951	New Delhi, 28.10.1988	
IRAN Exchange of Notes concerning the Settlement of Mutual Claims in respect of Damage incurred to the Diplomatic Premises of the UK in Iran and the Islamic Republic in London	London, 6.7.1988	TS No. 65 (1988) (Cm. 480)
IRELAND, REPUBLIC OF Agreement with respect to Veterinary Surgeons	London, 11.4.1988	TS No. 42 (1988) (Cm. 417)
Exchange of Notes concerning the Agreement providing for the Reciprocal Recognition and Enforcement of Maintenance Orders, signed at London on 9.12.1974	London, 26.5.1988	TS No. 62 (1988) (Cm. 473)
Agreement concerning the Delimitation of Areas of the Continental Shelf between the two countries	Dublin, 7.11.1988	Republic of Ireland No. 1 (1988) (Cm. 535)
ITALY Exchange of Notes concerning termination of the Exchange of Notes between the Government of the UK and the Government of the USSR concerning Deep Seabed Mining Areas, and the Agreement between the Governments of Canada, the Kingdom of Belgium, the Republic of Italy, the Kingdom of the Netherlands and the USSR on the Resolution of Practical Problems with respect to Deep Seabed Mining Areas signed at New York on 14.8.1987	Rome, 14.8.1987	TS No. 34 (1988) (Cm. 383), p. 17
Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	Pallanza, 21.10.1988	
CÔTE D'IVOIRE Exchange of Notes concerning Certain Commercial Debts (The UK/Côte d'Ivoire Debt Agreement No. 3 (1986))	Abidjan, 28.6.1988	TS No. 76 (1988) (Cm. 527)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
Exchange of Notes concerning Certain Commercial Debts (The UK/Côte d'Ivoire Debt Agreement No. 4 (1987))	Abidjan, 28.6/14.7.1988	TS No. 77 (1988) (Cm. 528)
Agreement establishing a Joint Commission on Co-operation	Abidjan, 15.11.1988	Côte d'Ivoire No. 1 (1989) (Cm. 668)
JAMAICA		
Exchange of Notes concerning Certain Commercial Debts (The UK/Jamaica Debt Agreement No. 3 (1987))	Kingston, 12.8.1987/16.3.1988	TS No. 52 (1988) (Cm. 451)
JAPAN		
Exchange of Notes further amending the Schedule annexed to the Air Services Agreement of 29.12.1952	Tokyo, 16.9.1988	TS No. 9 (1989) (Cm. 662)
MAURITIUS		
Exchange of Notes further amending the Route Schedule annexed to the agreement for Air Services between and beyond their respective Territories signed at Port Louis on 12.7.1973	Port Louis, 1.8/13.9.1988	TS No. 73 (1988) (Cm. 567)
MEXICO		
Agreement concerning Air Services	Mexico City, 18.11.1988	
MISCELLANEOUS		
Agreement between the Government of the UK and the Board of Governors of the European School concerning the European School at Culham	Brussels, 18.10.1988	Misc. No. 5 (1989) (Cm. 596)
MOZAMBIQUE		
Exchange of Notes amending the UK/Mozambique Programme Loan 1977	Maputo, 8/14.4.1988	TS No. 79 (1988) (Cm. 597), p. 12
THE NETHERLANDS		
Exchange of Notes concerning termination of the Exchange of Notes between the Government of the UK and the Government of the USSR concerning Deep Seabed Mining Areas, and the Agreement between the Governments of Canada, the Kingdom of Belgium, the Republic of Italy, the Kingdom of the Netherlands and the USSR on the Resolution of Practical Problems with respect to Deep Seabed Mining Areas signed at New York on 14.8.1987	The Hague, 14.8.1987	TS No. 34 (1988) (Cm. 383), p. 17
NIGER		
Exchange of Notes concerning Certain Commercial Debts (The UK/Niger Debt Agreement No. 4 (1986))	London/Niamey, 9.2.1987/18.1.1988	TS No. 68 (1988) (Cm. 483)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
Exchange of Notes concerning Certain Commercial Debts (The UK/Niger Debt Agreement No. 5 (1988))	Abidjan/Niamey, 2.8/5.9.1988	
PHILIPPINES		
Exchange of Notes concerning Certain Commercial Debts (The UK/Philippines Debt Agreement No. 2 (1987))	Manila, 24.3.1988	TS No. 71 (1988) (Cm. 513)
Exchange of Notes amending the UK/Philippines Debt Agreement No. 2 (1987) signed at Manila on 24.3.1988	Manila, 9.9/19.10.1988	
POLAND		
Exchange of Notes amending the International Road Transport Agreement signed at London on 26.9.1975	Warsaw, 27.1/31.7.1986	TS No. 49 (1988) (Cm. 448)
Agreement on Co-operation in the field of Medicine and Public Health	London, 28.1.1988	TS No. 25 (1988) (Cm. 355)
Exchange of Notes further amending the Agreement on Civil Air Transport signed at Warsaw on 2.7.1960	Warsaw, 20.6/13.7.1988	
SINGAPORE		
Exchange of Notes further amending the Agreement for Air Services between and beyond their respective Territories, signed at Singapore on 12.1.1971, as amended	Singapore, 17.12.1987/2.2.1988	TS No. 48 (1988) (Cm. 447)
Exchange of Notes further amending the Agreement for Air Services between and beyond their respective Territories, signed at Singapore on 12.1.1971, as amended	Singapore, 16.9/11.10.1988	TS No. 7 (1989) (Cm. 660)
TUNISIA		
Cultural Co-operation Agreement	London, 20.1.1988	Tunisia No. 1 (1988) (Cm. 474)
UGANDA		
Exchange of Notes concerning Certain Commercial Debts (The UK/Uganda Debt Agreement No. 3 (1987))	Kampala, 26.4/5.5.1988	TS No. 67 (1988) (Cm. 482)
USSR		
Agreement concerning International Road Transport with Administrative Memorandum	London, 22.1.1988	TS No. 4 (1989) (Cm. 657)
Exchange of Notes further amending the Agreement concerning Air Services signed at London on 19.12.1957	Moscow, 17.2/4.4.1988	
Exchange of Notes concerning the addition of a new Article on Aviation Security to the Air Services Agreement signed at London on 19.12.1957	Moscow, 17.2/4.4.1988	

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
UNITED STATES OF AMERICA		
Exchange of Notes extending the Narcotics Co-operation Agreement with respect to the Turks and Caicos Islands signed on 18.9.1986	Washington, 20.1.1988	TS No. 78 (1988) (Cm. 562), p. 23
Agreement concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking	London, 9.2.1988	United States No. 2 (1988) (Cm. 340)
Exchange of Notes further extending the Exchange of Letters concerning the Cayman Islands and Matters connected with, arising from, relating to, or resulting from any Narcotics Activity referred to in the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, dated 26.7.1984	Washington, 25.5.1988	TS No. 79 (1988) (Cm. 597), p. 20
Exchange of Notes extending the Narcotics Co-operation Agreement with respect to Anguilla signed at Washington on 11.3.1987	Washington, 24.6.1988	
Exchange of Notes further extending the Narcotics Co-operation Agreement with respect to the Turks and Caicos Islands, signed at Washington on 18.9.1986	Washington, 20.7.1988	
Exchange of Notes extending the Narcotics Co-operation Agreement with respect to Montserrat signed at London on 14.5.1987	Washington, 26.8.1988	
Exchange of Notes further extending the Narcotics Co-operation Agreement with respect to Anguilla signed on 11.3.1987	Washington, 23.9.1988	
Exchange of Notes extending the Narcotics Co-operation Agreement with respect to the British Virgin Islands signed at London on 14.4.1987	Washington, 10.11.1988	
Exchange of Notes further extending the Agreement in the form of an Exchange of Letters concerning the Cayman Islands and Matters connected with, arising from, relating to, or resulting from any Narcotics Activity referred to in the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, signed in London on 26.7.1984	Washington, 28.11.1988	

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
Exchange of Notes further extending the Narcotics Co-operation Agreement with respect to Anguilla signed at Washington on 11.3.1987	Washington, 22.12.1988	
YEMEN ARAB REPUBLIC		
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III. UNITED KINGDOM LEGISLATION DURING 1988 CONCERNING MATTERS OF INTERNATIONAL LAW¹

The Arms Control and Disarmament (Privileges and Immunities) Act (1988 c. 2) provides for conferring privileges and immunities on observers, inspectors and auxiliary personnel exercising functions under international agreements for furthering arms control or disarmament. (See Part Five: VIII. A., above.)

¹ Compiled by C.A. Hopkins.

The Criminal Justice Act (1988 c. 33) in Part I (sections 1–22) makes fresh provision for extradition. It provides a regime for the enforcement of future extradition treaties and other arrangements with foreign States, and will eventually supersede the Extradition Act 1870 as existing treaties are renegotiated. For countries which do not fall within the definition of ‘foreign State’ in section 1 of the Act, extradition will continue to be governed by the Fugitive Offenders Act 1967 or, in the case of the Republic of Ireland, by the Backing of Warrants (Republic of Ireland) Act 1965. Sections 134–8, which fall within Part XI of the Act, create an offence of torture, prosecutions for which require the consent of the Attorney-General, and make it an extradition crime. Jurisdiction over the offence is extra-territorial. The enactment of these sections enabled the United Kingdom to ratify the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. (See Part One: II. D. 1. and Part Four: VII., above.)

The Foreign Marriage Amendment Act (1988 c. 44) amends the Foreign Marriage Act 1892 by redefining persons whose marriages may be solemnised or registered under the 1892 Act, and by making new provisions as to consent requirements, form of ceremony, registration of marriages and marriages of children of HM forces serving abroad. It repeals certain spent enactments relating to the validation of marriages of British subjects solemnised outside the United Kingdom.

The Immigration Act (1988 c. 14) makes further provision for the regulation of immigration into the United Kingdom by amending and qualifying the Immigration Act 1971, as amended by the British Nationality Act 1981, in various respects. (See Part One: II. D. 1., Part Four: VI. and Part Five: VIII. A., above.)

The Merchant Shipping Act (1988 c. 12), *inter alia*, amends the law relating to the registration of British ships (Part I) and British fishing vessels (Part II). (See Part Nine: XV. D., above.)

The Multilateral Investment Guarantee Agency Act (1988 c. 8) enables the United Kingdom to give effect to the Convention establishing the Multilateral Investment Guarantee Agency of 11 October 1985. Certain provisions of the Convention, including provisions concerning the status, privileges and immunities of the Agency, are scheduled to the Act and are given the force of law in the United Kingdom.

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